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ROYAL COMMISSION ON TRANSPORTATION

Ottawa, Ontario,
Tuesday, May 16, 1950
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THE ROYAL COMMISSION ON TRANSPORTATION

OTTAWA, ONTARIO
TUESDAY
MAY 16th, 1950.

THE HONOURABLE W.F.A. TURGEON, K.C., LL.D., - CHAIRMAN
HAROLD ADAMS INNIS - COMMISSIONER
HENRY FORBES ANGUS - COMMISSIONER

G.R. Hunter
Secretary

COUNSEL APPEARING:-

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C.F.H. Carson, K.C.	}	Canadian Pacific Railway
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K.D.M. Spence		
I.D. Sinclair		
H.E. O'Donnell, K.C.	}	Canadian National Railways
N.J. MacMillan		
H.C. Friel, K.C.		
J.J. Frawley, K.C.)	Province of Alberta
J. Paul Barry)	Province of New Brunswick
M.A. MacPherson, K.C.)	Province of Saskatchewan
J.O.C. Campbell, K.C.	}	Province of Prince Edward Island.
W.E. Darby, K.C.		

Ottawa, Ontario,

Tuesday, May 16, 1950

MORNING SESSION

ARGUMENT BY MR. DARBY

THE CHAIRMAN: I believe we are to hear from Prince Edward Island this morning.

MR. DARBY: My lord, and members of the Royal Commission, on behalf of the Province of Prince Edward Island may I first of all express our appreciation for the courtesy that you have shown during this long and protracted inquiry into the transportation problems affecting this country. You have sat month after month listening to representations made by the various provinces, to the testimony of experts, and perhaps in some cases not so expert witnesses to substantiate those representations, and to evidence adduced on behalf of the two major railway companies of Canada as well as that of other transportation agencies with a patience and forbearance that I think speaks well for the wisdom of the Federal Government in appointing you as the personnel of this important Commission.

THE CHAIRMAN: Thank you.

MR. DARBY: Sitting in my hotel room last night with very little to do and with the usual bible there, it occurred to me that we might liken the members of this Commission to Job in the patience they have shown throughout this inquiry. I can only hope that the eventual end will be as successful in your case as it was for that biblical character.

THE CHAIRMAN: I am glad to see that at least one of Job's comforters is present this morning.

MR. DARBY: I hope you do not refer to my colleague,

Mr. Tolson: I believe it is...

Mr. Tolson: I believe it is...

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Mr. Tolson: I believe it is...

Mr. Tolson: I believe it is...

Mr. Tolson: I believe it is...

Mr. Tolson: I believe it is...

the other Prince Edward Island representative. The terms of your reference, my lord, were in many respects broad, and in others seeking solutions to particular problems. The Government of Prince Edward Island has not endeavoured to deal with all the various matters that were to come within the scope of your Commission's inquiry. As a matter of fact we had neither the means nor the opportunity to collect all the information or statistical data that would be necessary to make a complete submission on all aspects of the question. As a matter of fact, the representations of the other provinces before the Board of Transport Commissioners in relation to freight rate increases indicated that they were ready and intended to make those submissions to this Commission. Therefore we felt that if we had endeavoured to embark on this somewhat ambitious project it would only have tended to needless repetition, so we have confined our representations to you in so far as it relates to the Province of Prince Edward Island in particular, and as the third part of our printed brief indicates to a submission dealing with the problem of transportation as a whole.

In our brief, which was filed with your Commission, we substantially set out the position as far as Prince Edward Island is concerned. We endeavoured to outline to you the peculiar economic and geographic disadvantages under which we labour in relation to transportation. In that submission we outlined for your consideration the picture of our industrial and agricultural economy. We indicated our lack of manufactures, the limitations on our industrial expansion, the availability of possible markets, and our geographic isolation.

We also gave you a picture of our transportation

facilities, their defects and their weaknesses. In short our written brief, supported as it was by the statistical data that was placed in the brief and substantiated by the evidence of the witnesses who were called at Charlottetown and before your Commission here, set forth, as we saw it, our difficulties, and the suggestions that we wish this Commission to make in the way of a recommendation for specific relief in certain instances.

Therefore I do not propose this morning to make a comprehensive review of our brief. I think perhaps in some respects the Province of Prince Edward Island took a slightly different tack from some of the other provinces. They outlined a resume of a brief in the beginning and then put their whole case before you here in Ottawa by the testimony of expert witnesses that took days and days to hear. Our brief is contained in Volume 25 of the evidence. To a certain extent I shall refer to the brief as we go along.

As I say, my lord, we do not propose to make a comprehensive review of the whole brief this morning but what I had in mind was to emphasize certain matters that we felt were of the utmost importance, and then my associate counsel, Mr. Campbell, would deal with others as well as with the general recommendation as to the transportation problem of Canada as a whole. I think therefore that I could perhaps properly continue by dealing with the specific recommendations that we made in Part II of our brief.

THE CHAIRMAN: Is that about government ownership?

MR. DARBY: Beginning at page 77, my lord, and continuing from that point on. The first of those recommendations was the one for a second car ferry.

THE CHAIRMAN: Oh, yes.

MR. DARBY: It is true that at the present time, as your lordship and the members of the Commission know, we are served by that very magnificent ship, the Abegweit, and that we have in reserve the old car ferry.

THE CHAIRMAN: You have what?

MR. DARBY: We have in reserve the old car ferry, Prince Edward Island.

THE CHAIRMAN: Has there not been some change made there recently?

MR. DARBY: Yes, my lord. I intend to come to that point as I develop our argument in that regard. Up to the present time -- I shall have to put it that way -- this other ship has been used as a substitute during periods of congestion. I think the evidence showed that about the only time of the year, except for special freight crossings, when it was put in use as a service to the travelling public of Prince Edward Island was during that Old Home week celebration in Charlottetown when there were thousands of people came over there to see the horse races. Apart from that it was left tied up at the pier.

I think we have indicated in our brief the tremendous growth of traffic over that Borden-Tormentine route. We have indicated that growth at page 14 of the brief. At the beginning of the service in 1917 -- there are no figures for 1917, and in fact not until 1921 when 15,000 was the total of railway freight, passenger and baggage cars passing over the ferry.

(Page 22777 follows)

By 1925 - that was the last year before the Duncan Commission - 21,000 had been transported across. At that time, as you know, that Commission had recommended that in view of the increasing traffic and freight crossing over between the Island and the mainland, a second ferry should be provided. That was carried out. First of all we had the "S.S. Charlottetown" which was later sunk; and then this new boat the "Abegweit" which is in operation now. In 1948 - that was the last year for which we had the figures when this brief was prepared - the total number transported was 52,620. We say that the principle would therefore appear to be established that the provision of an adequate ferry service should be based from time to time on the current requirements of the traffic. If 21,000 freight cars in 1925 required a second car ferry, which was granted as a result of the recommendation of the Duncan Commission, then we say that at that time we had the "Prince Edward Island" and they gave us a second one, the second one being the "Abegweit". Today we have the "Abegweit" and we have the old original car ferry, the "Prince Edward Island" in reserve, almost.

But if once we establish the principle - and I think it has been established - that adequate ferry service must be consonant with the current requirements of the province, then I think we must re-examine the situation from time to time to see whether or not in a given period the service that is provided is adequate to perform the functions for which it was intended. The freight is only one feature in considering whether or not we are now provided with an adequate ferry service. The passenger traffic on the boat itself increased from 126,000 in 1942 to 185,000 in 1948. We have a similar growth in the number of automobiles transported across: 4,296 in 1926 and 45,000 in 1948.

We have a growth there of automobile traffic of over 1,000 per cent since the day when it was recognized that we should have a second ferry. In addition to that we have a corresponding growth in truck traffic from 535 in 1944 - the figures are all set out in the brief - to 4,240 in 1948. Now we have an increase there of over 800 per cent. Upon whom is the liability to provide this service? We say that that liability rests with the Government of Canada as one of the terms ^{on which} we entered union. The Order in Council specifically states that. That is one thing, it seems to me, my lord, that has been lost sight of to a certain extent throughout the years. The Order in Council specifically states:

"That the Dominion Government shall assume and defray all the charges for the following services viz:--" And it lists a number of them. Then it gets down to this particular one:

"Efficient steam service for the conveyance of mails and passengers to be established and maintained between the Island and the mainland of the Dominion, winter and summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion."

THE CHAIRMAN: I believe that Order in Council was set out in your brief?

MR. DARBY: It is set out in the brief.

THE CHAIRMAN: What page is that?

MR. DARBY: At page 14, my lord; at the end of page 14.

THE CHAIRMAN: Yes.

MR. DARBY: We think that that obligation is a continuing one. I do not think it can be said that that was only intended for the establishment of a service. It is

an entirely different matter to say that the Dominion shall assume and develop all the charges for certain services.

The Order in Council says:

"Efficient steam service for the conveyance of mails and passengers to be established and maintained between the Island and the mainland of the Dominion, winter and summer, thus placing the Island in continuous communication"

with the mainland. That does not mean simply that you establish a service. It must mean that you establish it and maintain it. You must make it continuous. You must make it adequate and at the cost of the Dominion of Canada.

THE CHAIRMAN: Do you attach any significance to the fact that the service described in that Order in Council is the conveyance of mails and passengers?

MR. DARBY: I think that we have got to read that in the light of the conditions as they obtain at the time. I think it was to provide the link between Prince Edward Island and the mainland, to place it in continuous communication with the mainland of the Dominion, to provide the service.

THE CHAIRMAN: You see, the engagement is "that the Dominion shall assume and defray all the charges" for that service. That is what the Order in Council says.

MR. DARBY: Yes, it is for that service; if you provide a service that is adequate .

THE CHAIRMAN: What happens today, Mr. Darby? To what extent is that Order in Council followed literally today? The Order says:

"that the Dominion Government shall assume and defray all the charges for the following services... the conveyance of mails and passengers to be established ..."

and so on, and the Island placed in continuous communication with the intercolonial railway. What is going on today to show the carrying out of that provision?

MR. DARBY: We have the ferry there that goes from one side to the other and the passengers in some instances go in a Pullman through, where^{as} others get off the passengers' cars at the side of the boat, climb on the ferry and go across. Automobiles drive on and they pay for the privilege. Passengers pay for the privilege. As far as freight is concerned, the freight is being charged for as it goes across the Strait, according to the submissions made by the railway; and I think that is correct.

COMMISSIONER ANGUS: Are you suggesting that they ought not to pay?

MR. DARBY: Who?

COMMISSIONER ANGUS: The passengers.

MR. DARBY: Strictly speaking, if we interpret it correctly, I do not think they should. I think they are just as much entitled to go on that ferry, to walk on that ferry and walk off on the other side free.

COMMISSIONER ANGUS: Has it ever been suggested that there should be no postage stamps on letters?

MR. DARBY: Of course, there would be very little mail, my lord, that would just simply go from one pier to the other. It is all part of the charge. I do not know whether they actually take into account that nine miles of ferry or not. I suppose it is all absorbed in the general postage charge in going from a point like Summerside to Montreal or from Charlottetown to Montreal.

THE CHAIRMAN: I may say that your brief does not give us the whole of the Order in Council. There are lapses in it which might clear up the whole situation.

MR. DARBY: Well, there is reference --

THE CHAIRMAN: You seem to have put in there just the part that is strictly pertinent to this matter.

MR. DARBY: That is right. There are other parts here: the following services viz: the salary of the Lieutenant Governor, Postal Department, Protection of the Fisheries, Provision of the Militia, Lighthouses. That would not mean that you would simply establish a lighthouse and then leave it to its own devices.

(Page 22783 follows)

That includes not only the provision of that lighthouse but the building of it, the maintenance, the upkeep and the pay for the operation of it. I say that if it applies in one instance it must apply in all others. As to the maintenance of telegraphic communication, I think that was dealt with at some length during the course of the evidence. I believe that in the case of telephonic communication, it all passing through that cable that extends from one side to the other, no charge is made. With regard to the telegraphic part of it, I think the picture was that it was so absorbed in the particular charges that obtained from one point to another that you could not possible reflect any charge or lack of charge on the particular nine miles across over the strait.

THE CHAIRMAN: Well, there is no doubt that the Dominion Government did undertake to provide you with an efficient year-round ferry service, but of course that did not mean that those who used the ferry would not have to pay for it if necessary. They provide you with the service.

MR DARBY: Maintain it.

THE CHAIRMAN: I beg your pardon.

MR DARBY: Maintenance, operation.

THE CHAIRMAN: What is the position today? Supposing you were at the ferry embarkation point on the Island and wished to come over to the Mainland, and got on the ferry to do so, would you pay a toll there?

MR DARBY: Oh, yes, we buy a ticket; I think it is sixty-five cents or seventy-five cents return.

THE CHAIRMAN: Have you ever claimed that you should be allowed to cross free?

MR DARBY: I do not think there has ever been any test case made of the thing.

THE CHAIRMAN: I beg your pardon?

MR DARBY: After all, I think, as a matter of convenience, we have no particular objection to paying a reasonable toll.

THE CHAIRMAN: And you are not objecting now?

MR DARBY: Oh, no, we are not objecting to a reasonable passenger toll, as far as that is concerned. The only point in connection with the matter of tolls was in connection with the truck traffic, as passengers crossing over on the ferry, and the exorbitant rates that were charged up to the time when this Commission sat. That is one thing we can thank this Commission for, for the mere fact that it is in existence, because after you sat and after our representations were made here we find that the old toll that cost them about thirty dollars to take a truck and a little bit of freight across on the ferry is now back to three dollars one way and four dollars return whether the truck is loaded or not, which is exactly what we say it should be, because, after all, this ferry, if it is a link between Prince Edward Island and the Mainland, then the transportation that goes across should be at a reasonable charge and no more for the space that is occupied.

THE CHAIRMAN: Have all your other grievances been cured by the appearance of this Commission?

MR DARBY: Well, now, my lord and members of this Commission, it is just surprising how many of them have. The only thing we are scared of is, unless as a result of your Commission's existence we have a recommendation that they may be made permanent policy, they may go back to the same old position they were in before. I must say that the attitude that has been developed toward Prince Edward Island seems to have taken an amazing change for the better. In

some ways I would like to see this Commission sit forever, without wishing them that much hard luck, but certainly as far as Prince Edward Island is concerned, you have sat now for a year, and in that year we have had more progress toward assisting our transportation difficulties in Prince Edward Island than we had from 1873 to 1949.

However, our difficulties have not all been done away with. We have this: we still have the delays in the crossings, the delay in handling this passenger and tourist traffic that comes to Prince Edward Island.

THE CHAIRMAN: That still remains, does it?

MR DARBY: That still remains, except in so far as what I will mention. A little later, about three weeks ago, another of our ills was temporarily cured. We were given the second ferry to operate from June 15th to September 15th, so that during that period we hope that there will be no more delays in the handling of passenger and tourist traffic, but those delays did exist until we got this shuttle service, but that shuttle service was only granted from June 15th to September 15th of 1950, with a hinted suggestion that if it did not pay that might be the end.

Now, we say since the provision of this service, if it is a matter of the cost to the Dominion, then whether you take it as part and parcel of this provision of the Order in Council admitting Prince Edward Island into the Union or whether you take it as part and parcel of the Intercolonial Railway as it exists to serve Prince Edward Island, it should still be maintained regardless of whether it is a paying proposition or not, because the whole basis of the establishment of the Intercolonial Railway System in the Maritimes was not as a commercial proposition but to serve the national interest. So far as this ferry service

is concerned, whether it is for passengers or freight or as a small segment of the old Intercolonial Railway, the matter of cost should not be a paramount consideration.

I think we have set out in dealing with the railways the pronouncements that were made prior to Confederation to bring Prince Edward Island and Nova Scotia and the other provinces into the Union. I think we set out you might say the imprimatur that was made on the whole thing by the ^{Duncan} Commission, where they said: (p.9)

"To the extent that commercial considerations were subordinate to national, imperial and strategic considerations, the cost would be borne by the Dominion and not by the traffic that might pass over the line."

THE CHAIRMAN: Who says that? That is the Duncan Commission?

MR DARBY: That is the Duncan Commission.

THE CHAIRMAN: How do they say it?

MR DARBY: That is quoted there:

"To the extent that commercial considerations were subordinate to national, imperial and strategic considerations, the cost would be borne by the Dominion and not by the traffic that might pass over the line."

THE CHAIRMAN: That is the Intercolonial Railway you are talking about?

MR DARBY: Yes, as I say, and Prince Edward Island was our portion of that, and it was all on the same basis.

In the Duff Report at page 76:

"The promise of railway construction formed an integral part not only of the arrangement of 1867 but also of the terms on which Prince Edward Island.... later entered the Union."

And then it goes on on page 77:

"So if today the Intercolonial, forming with the National Transcontinental Railway the Eastern Lines of the Canadian National System, seems to present many of the aspects of commercial failure, it should be remembered that its economic defects are to a great extent inseparable from the origin that had its roots and remains rooted in the broader considerations of public policy."

(Page 22789 follows)

Now, therefore, our service should be such as to avoid those delays and should be provided adequately to avoid them. Now, we say at the present time, since this new service, that has been avoided to a certain extent, but up to June 15th, there was the same attitude with regard to the traffic that might pass over that road, the delays that we had, passengers and tourists coming there, which was referred to in our Brief. I think of the remarks of Mr. Walsh before the Railway Committee of the House of Commons, how he came down to Prince Edward Island and the delays that he encountered -- all pointing to the necessity for a second ferry.

In relation to that matter of a second ferry, I might refer your lordship to Exhibit 87. That was that letter from the President of the Canadian National Railways to Mr. Rogers under date of October 14 in which he says:-

"As you are well aware, automobile tourist traffic, especially in the summer months, is extremely heavy between the mainland and Prince Edward Island. During such period of heavy traffic it sometimes happens that the ship is unable to accomodate all the waiting vehicles."

Now, that is an admission by the head of the railway itself, and I think you heard Mr. Campbell in his remarks as to delays he encountered, and that was, I think, set forth at page 4701 of Vol. 25, coming back and forth to Moncton.

I might recall to your Commission's attention Exhibit 90. Now, that is the one that showed the hours of the evening ship movement, that is the present ship, before this additional service was provided last year,

and the accompanying train movements during the months of July, August and September last. I have not the Exhibit heré, but I did look it over , and I might just refer to that Exhibit. In September it was never on time. In the few days that she ran in June, she was on time once. In August she was on time nine nights. In July, which was the time when your Commission sat at Charlottetown, up to July 22nd (I think that is when you crossed) she had been on time four evenings up to that time. And of course, during the four days that you were there that train and the boat crossed right on the dot for four consecutive nights for the first time in the history of Prince Edward Island, and again I say that I would like to see this Commission continue, because I think - -

MR. O'DONNELL: I was waiting on the train all the time.

MR. DARBY: Yes, you were waiting on the train, they were riding on the train of course. The train got there on time and the boat was on time on that occasion; but it doesn't make a bit of difference whether the train is on time or not, that car ferry is there at Tormentine. Seven o'clock, we will say, is its scheduled crossing. I might say I have come down there after the Commission was in Charlottetown and I had been doing a lot of hard work and I thought I would take a few days off with my wife and I took a tour through Nova Scotia. We landed back and I was at the corner at Aulac and I did not have very much time to make the boat. I think I had about twenty-five minutes to make perhaps thirty odd miles to get there by seven or seven-ten, whatever it was. I was driving pretty fast and my wife said: "I think you'll have to ease up and we'll have to wait for the next boat,

because we don't want to get killed instead." I said: "Perhaps you are right", so I slowed down. I got there at seven-fifteen, and when I got in sight of the pier, sure enough, there was the Abegweit, and I said "Thank God she was late tonight", so we drove merrily on board and we sat there until eight and we sat there until eight-thirty and nine and nine-thirty and finally for some strange reason at nine-thirty -- I think the train must have come down -- but whether it came or not, finally at nine-thirty it pulled out and I got home at mid-night whereas I expected to get home at nine o'clock. Now, if I had been a casual tourist, coming into Prince Edward Island, I know what I would have done when I got on the Prince Edward Island side. Having driven on the boat I would probably have stayed on it, but when I got to the Prince Edward Island side I would say "That's enough for me", and get on the next boat back. That is what we have been faced with all the time. Why in the name of heaven, if that boat was designed to look after the service at Prince Edward Island, why in the name of heaven it didn't leave at seven-ten and cross over to Prince Edward Island and go back, when it would still have been in time for that train, I don't know except that it seems the ferry service must be tied to the railway, and that is what we say should not be. The ferry should operate on a schedule, and let the railway dovetail into the ferry schedule.

Now, if we had two boats crossing on the hour every hour from either side, it would be immaterial.

THE CHAIRMAN: What is the position right now? Have you got two boats?

MR. DARBY: We have the second boat which is now in operation, as I say, for those three months.

THE CHAIRMAN: Then the delay such as the one

that you - -

MR. DARBY: The delays then should not obtain this summer, but when we ask for a second ferry we are substantially asking for a second ferry, because after all we have the Abegweit and we have this old thirty-five year old boat. Now, it is true she is now operating, but that is an old boat that has plunged through ice for thirty-three years or more, not a boat that has had no strain or anything of that kind, and we don't know, who knows, when a complete breakdown is going to take place. So we say that in order to really have two boats, the keel of the second boat should be recommended to be laid down now, so that we can be sure that at any time we will have two boats to operate on that service. I mean, breakdowns have taken place before this. When the Abegweit was in dry dock on one occasion, the Prince Edward Island car ferry broke down. I think it was one time during the war. Mr. Rogers in his evidence spoke of that. They had to get an airlift into Prince Edward Island to keep us fed.

Now, everything we have got depends on that ferry operating. That is the point as far as Prince Edward Island is concerned. Unless that ferry operates between Borden and Tormentine we are through. Everything we have that we can sell goes out through it; practically everything that we buy comes in through that ferry, all our coal, our oil, all our articles of machinery, our foodstuffs. We manufacture nothing; it must come through that ferry.

Now, there is a breakdown here, I think, on page 40, total carloads, that is, loaded cars. Now, some time ago I spoke about the number of railway vehicles that passed back and forth over the ferry as 52,000. Now in 1948 it was 29,929, we will say 30,000

carloads of freight that crossed over that ferry and I give the breakdown. Less than carload freight, nearly 3,000 cars; coal, 2,600 cars; flour and feed grain, 2,100 carloads; meats, 117 carloads; gas and oil, 1,500 carloads; and 8,455 carloads of miscellaneous imports into Prince Edward Island. They make a total of 17,000. On the way out there was over 12,000 carloads that went over that ferry. Of less than carload lots there were 937. That just gives you a picture. We bring in 2,993 less than carload lots freight and we ship out 937. We have very little to ship out except the three items that then follow: livestock, 1,100 carloads; potatoes, 7,292; turnips, 1,125; and miscellaneous, 1,626; totalling 12,000 carloads going out.

Now, that is our dependency on this service that must be operated and maintained between Borden and Tormentine. I have had it said to me: "Oh, you have a wonderful ferry there." Certainly, we have a beautiful ferry. You can go in there and have a lovely meal in grand surroundings and take back so many passengers and so many freight cars, and all that sort of thing. That is our one and only way to get in and out of Prince Edward Island during most of the year. Now, to me our whole economy depends on that service there being continuous and efficient.

Now, I am going to mention the need of it. The need of it has already been established when about two weeks ago the Minister of Transport announced that the second ferry would be placed in continuous operation. That establishes the need, but we must have the assurance that that adequacy of services can be maintained, and it cannot be maintained with one boat and an old thirty-five year old boat left in reserve that might break down

or go out of commission at any time. It would take about five years or more to have another boat ready for the service. In other words, by that time this old boat would be nearly fifty years old. Now, it may be a great boat, but after all boats are like everything else: they do eventually wear out. In Prince Edward Island we are a small place, that is true, but I think this Commission will say that after all we do labour under geographic disability, and the only cure for it is the maintenance of the service. Give them a second boat. You have acknowledged the principle; make sure that that principle is maintained so that their whole economy will not later be disrupted.

THE CHAIRMAN: Now, you told us that there is to be a second boat between June 15 and September 15. Is that so?

MR. DARBY: That is right.

THE CHAIRMAN: If nothing else is done, what would happen to the second boat after September 15th?

MR. DARBY: Well, immediately after September 15th it will probably go into drydock for repair for a period of six weeks or more, and after that, it will be tied up at the wharf on one side or the other.

I just want to call to your attention to something that I just received here the other day. Prince Edward Island last year had a rather bountiful potato crop. As a matter of fact, it was much larger than usual because of special circumstances. I have just got the figures here because I wired down to them for them so that I might just give them as a matter of information. Up to April 1, 1950, that is the 1949 crop, there were 7,148 carloads of potatoes shipped by rail and 2,916 by boat, making a total of 10,000 carloads. Now, in the month of April, that is in the previous year, the total shipment was 8,000. Now, we have still got part of the crop to move.

(Page 22797 follows)

The year before that it was 8,700. Here I must say that I wish to compliment the railroad. They certainly did a good job in the month of April last. There was a sudden market for Prince Edward Island potatoes. We thought from the way the market was going that we might have a couple of million bushels left to rot. However, there developed a market, not a very profitable one, but at least the potatoes moved. Since I came up here I wired to find how many cars moved, and I think it is the correct figure.

In April, 1,415 carloads of potatoes were shipped by rail. That is in the month of April, 1950. That represents a million bushels more or less. If anything had happened that one boat had been away and there was a breakdown on the other that freight could not move. The potatoes would rot.

I must say the railroad did a magnificent job. They brought in reefers and other refrigerator cars. I think the two boats must have operated for a while even though temporarily one of them might have been intended to hang around the pier. We got 1,415 carloads of potatoes out in April. As I say, the price was not very heavy. The April price was 46 cents for everything, cobbles included. In the month of March it was 46 cents for other white potatoes and 75 cents for cobbles. Apparently at that time cobbles had a premium value but in the month of April the whole works went at 46 cents a bushel.

There is a concrete instance of why the provision of adequate service should be recommended and because, as I said before, we only have one outlet, through Borden. We base our claim here on two points, first as part of the contractual obligation of Canada in so far as the

order in council applies, and secondly that this is a disability from which we suffer because of our geographic disadvantages and as such should be rectified as compensation for geography. That comes exactly within the bounds of the inquiry of your Commission. I say again that the recent action of the Minister of Transport is a partial recognition of the claim, and our suggestion, if your lordship and members of the Commission will accept it, is that you recommend that it become permanent policy. The only way that can be permanent policy, the only way to make sure it is permanent policy, that is, the maintenance of this shuttle service, would require not only your recommendation as to the permanency of the policy but a further recommendation for an additional ferry so that we will always have two ferries.

By the same token in fifty years' time or forty years' time when one or other of the ferries will be substantially worn out, in order to make sure that we have two ferries to provide this recognized service the keel of a second ferry should be laid. That is all I propose to say about the first recommendation as to the second ferry.

The next item is No. 2, the recommendation that the car ferry service be operated by the Department of Transport or by an independent commission, and not by the Canadian National Railways.

THE CHAIRMAN: Where would we find that?

MR. DARBY: You will find that on page 80 of the printed brief.

THE CHAIRMAN: Did you say 18 or 80?

MR. DARBY: 80.

THE CHAIRMAN: The operation of the car ferry service by the Department of Transport or by an independent commission?

MR. DARBY: That is right.

THE CHAIRMAN: And not by the railway?

MR. DARBY: Not by the railway. We feel that is an interprovincial service. It should not be tied up with railway practices or railway methods because if you treat the car ferry service as a rail service then everything that the car ferry does is s treated on the basis as if it is rail. That is not the primary function of this ferry service. The obligation is to provide a service that will give communication, an interprovincial link. I have referred to that in our printed brief. We refer to our position on the matter.

I think the same difficulty must have been present in the minds of those who placed the position of Prince Edward Island before the Duncan Commission because we find the Duncan Commission report specifically says at the bottom of page 27:

"The present car ferry affords much improved service as compared with that the Island formerly enjoyed."

I think that is true. I think when Mr. Rogers was on the stand he showed you a picture of the previous service that we had prior to 1917. I think he had a photograph that showed how his father was one of those who helped to propel the craft across the strait, part and parcel of this efficient and continuous communication between Prince Edward Island the mainland as late as 1907, I believe it was.,,Thirty-five years after Confederation, when they said they were going to give us this service between Prince Edward Island and the mainland they got an iceboat and helped to propel themselves across the strait.

Of course that is Prince Edward Island. We are

a small province. We have only 90,000 people, and if they had to propel themselves across the strait that was all right for thirty-five years. Thank heaven conditions have improved a little since then. It is an attitude of mind. The Duncan report says:

nonp

"When the present ferry steamer was constructed it was not contemplated there would be motor traffic."

There has been a development of motor traffic, and that traffic is still growing today. It is bound to grow because at one time people walked, then they road on horseback, then they had a horse and carriage, and then the automobile. The automobile is a part of modern transportation. The Duncan Commission report goes on to say:

"There have been many complaints by visitors and tourists. Altogether the ferry boat service is unsatisfactory."

That is the conclusion at the bottom of page 27. They also say:

"The railway administration admitted that there was need for supplementary provision being made for a second ferry boat or special freight. We recommend that the matter be gone into. We further recommend" --

Here is what I want to emphasize.

" -- that so far as the ferry boat service is concerned it should not be run as a part of railway operations but should be run by the railway administration under separate account for the department. We feel that by reason of this association with railway accounts the

service does not get the attention it should receive."

That all ties in with what I mentioned before when the boat had to wait for the train.

COMMISSIONER INNIS: How long has it been under the railway?

MR. DARBY: In one guise or another they have continued to operate it since 1927.

COMMISSIONER INNIS: What about before that?

MR. DARBY: Well, they operated it before that.

COMMISSIONER INNIS: Did the Intercolonial operate it since the beginning?

MR. DARBY: I think so.

COMMISSIONER INNIS: Before the Intercolonial was there a service?

MR. DARBY: Before 1917 there was nothing there at all. There was no real communication at all. The service we had in Prince Edward Island before that consisted of a ship running from Summerside to Pointe Dechesne, and another ship that ran from Charlottetown over to Pictou.

COMMISSIONER INNIS: Was that under the department?

MR. DARBY: No, a private company.

COMMISSIONER INNIS: There was no administrative machinery whatever concerned with this problem prior to the coming of the railroad?

MR. CAMPBELL: In the winter time there was first the Minto, then the Stanley and then the Earl Grey, which was sold to Russia. There were three winter boats but nothing in the summer time.

COMMISSIONER INNIS: Were they in charge of the department?

MR. CAMPBELL: I think they were run by the

Department of Railways.

COMMISSIONER INNIS: So the Department did assume responsibility?

MR. CAMPBELL: Only in the winter time.

COMMISSIONER INNIS: This arrangement by which it is entrusted to the railway is a fairly recent development, as you say, since 1917?

MR. DARBY: I am not sure what the date of that entrustment was. It is referred to in the truck rates case.

MR. O'DONNELL: There is some reference in the Sirois Report, Volume 2, page 264.

COMMISSIONER INNIS: Does that give the date of the entrustment?

MR. O'DONNELL: It refers to the situation prior to 1901, and in the order in council taking Prince Edward Island into Confederation there is a reference to a steam ferry boat owned by the Government of the Island and used as such, which remained the property of the Island. My understanding is they continued that service for some time after Confederation.

COMMISSIONER INNIS: So that whatever machinery there was was provincial?

MR. O'DONNELL: I think so.

MR. DARBY: As I say, despite that recommendation, and although they have segregated the accounts, nevertheless they still treat these ferries as rail and we say they should not.

THE CHAIRMAN: You say two things, that they should be operated by the Government or by a ferry commission and that they should be free of charge.

MR. DARBY: Oh, well, we do not stress the latter point too much.

THE CHAIRMAN: You put it in your brief.

MR. DARBY: Technically we say so but it is like in a lawsuit sometimes. You plead everything and do not rely on all the points. As I say, I am not too sure that in some respects we could not make that point stick in a court of law. However, for the purpose of this argument, my lord, I do not think we need labour the freedom of the service as long as the charges made are reasonable.

COMMISSIONER INNIS: Have you any preference as between the Department and a commission?

MR. DARBY: I do not think so. Probably an independent commission might be better because there might be other services between the Island and the mainland that could be put under the administration of an independent commission if it were created.

THE CHAIRMAN: You want the ferry to operate independently of the railway?

MR. DARBY: Yes.

THE CHAIRMAN: And let the railway fix its time table so as to make its own connection with the ferry?

MR. DARBY: To make connection with the ferry and not have the ferry make connection with the railway time table. Since it is administered by the railway they are bound to do that. After all it is human nature.

COMMISSIONER ANGUS: If the train is late do you want the passengers to wait until the next day?

MR. DARBY: If there is a shuttle service they would be picked up on the next crossing. Instead of having sixty automobiles with five passengers each having to wait until nine or nine-thirty for the train to come,

when seven o'clock comes the ferry would pull out with the people, land them on the other side and come back.

(Page 22807 follows)

If the train is half an hour late, they catch the next ferry. It is far better for half a dozen people to be half an hour late than for three hundred people to be one and a half hours late or two and a half hours late. Let the shuttle service look after them. I think if we had an independent commission operating those two services - and I am going to talk two ferries from now on because I think that the only thing we can really get along with is two ferries - the facilities would be there for the trains to use them, but they should go on schedule. There would be ample time, in between, to get the freight loaded and transported across, when you have a proper service.

COMMISSIONER ANGUS: Have you considered the possibility of a ferry exclusively for motor vehicles, that would run on fixed times and then a rail ferry that would conform with the train movements?

MR. DARBY: We have considered that, and I think it would be of great assistance. The only thing is that if you are going to spend a lot of money to provide a service that could only look after a partial service, why not spend a little bit extra so that you will have a boat that will be available as a complete stand-by to look after both freight and passenger services--truck, automobile, passengers and the freight. Instead of making two bites of a cherry, we might as well make one bite that will look after it all, even though it does mean a few extra hundred thousand dollars. I think we heard some statement made to this effect: "What is the matter of a million dollars today?" Apparently it does not matter very much in some parts of the country, but it means a great deal down in Prince Edward Island.

I do not think I need to labour this point. The whole trend of railway administration in the car ferry has been, as I say, to forget that that primary function of ferry

service is an instrument of national policy. It is an implementation of the terms of Confederation, and it should not be treated as it has been, in the light of how it is going to affect railway revenue. That is how they have treated it all through the piece. We had put in the record in the course of the inquiry a letter from the Vice-President of the C.N.R. to, I think it was Premier McMillan in Charlottetown, Exhibit 86. What does he say? He says:

"We as a railroad cannot overlook the fact that in reality every automobile we handle on the ferry is in competition with our own rail route."

It is not their business whether it is competitive or not. This ferry is owned by the Department of Transport or by the Dominion of Canada, to service Prince Edward Island. As the operators of that ferry, it is none of their business what traffic they take over on that ferry, whether it is competitive to the railroads, whether it is competitive to the truck or whether it is competitive to the bus. If the members of this Commission were the Ferry Commission, and along came a truck or an automobile, you would say, "All right. You are going to occupy so much space on this ferry; we will charge you so much for the space." I think that would be the logical thing. We have shown here before now, up until the sittings of this Commission, what the charges were. We had \$30 for a truck that took up a little bit of space on the ferry, and we had \$2 charged for a railway car that took up the space of three or four trucks. Certainly from the point of view of railway administration it was good business - as a railway it was good business - to carry that railway car for \$2 and bring the empties back free, and to charge the truck \$30. But as an independent operator of that ferry, if you are going to charge that truck \$30 for a little bit of space,

if you were an independent operator you would say, "All right, railroad; for twice that space you will pay us \$60." So that ⁱⁿ the administration by the railway, the whole tendency was to treat the operation of the ferry as a rail operation and ^{to} charge their own stuff less and to charge any competitive traffic more. But mind you, they are not there to operate that ferry from the point of view of one competitive service or another. They are there to provide a service for Prince Edward Island.

THE CHAIRMAN: I suppose, insofar as freight rates are concerned, it is considered as part of the rail operation, is it not?

MR. DARBY: Yes, as far as the distance is concerned, they charge the same amount as the rail operation.

THE CHAIRMAN: Yes.

MR. DARBY: We would not cavil at that. But if that is so, we say--

THE CHAIRMAN: You would want to maintain that, would you not?

MR. DARBY: Yes. We would want to maintain that. But we would want the operators to maintain a comparative basis in charges for the rail and non-rail operations that go over the ferry. The same thing has gone on all through the piece. This is just one instance. We had another instance of that same attitude. I think I referred to it there when the argument came up on this truck rates case. We had tried to get the truck rates reduced from this tremendous charge of \$30 or \$40 for a loaded truck, and they made an application before the Board of Transport Commissioners. We had the argument of the railway, and I copied it out. It is at page 56 of my brief. Mr. Dysart, K.C. was counsel for the C.N.R., and this is what he said:

"The preliminary question which the railway asks itself in relation to these operations is, what is the mandate we have received from the owners in relation to the operation and maintenance of the Prince Edward Island Car Ferry?"

Then he goes on later to say:

"It is my submission that the duties and responsibilities of the Canadian National Railway Company are, , at the very least, those of a prudent administrator of a facility entrusted to it by the owner.

With that as a preliminary foundation, the Canadian National Railway Company proceeds to the question of what should be charge and how should this facility be operated? I think one of the elementary principles which must be followed in the administration of any facility is that a reasonable effort be made to meet operating expenses."

The two things just do not gibe: \$30 for a truck that takes a little bit of space and \$2 for a freight car. It has got to be either one thing or the other. Either it must be operated as an instrument of national policy or it must be put on a pay basis; and in that case, charge the proper fee for hauling a freight car across or not hauling it across. I must say that the present situation is not so bad because

now that your Commission has sat, we have this rate reduced to \$3 one way for trucks and \$4.50 return. We really cannot complain too much; but this Commission is not going to sit forever.

THE CHAIRMAN: Are you sure?

MR. DARBY: For the sake of your lordship and the other members of the Commission, I would hope not; but this attitude is likely to revive itself again.

I might for a moment refer to this matter of \$2 for the freight car. We mentioned that in our brief, and some effort was made by Counsel for the C.N.R., at page 6844 of Volume 36, to explain this charge. He says that 1.074 cents was charged per ton mile for the freight carried by the railway over the ferry and that this included the charge for the carriage of the empty freight and other cars. We said that they charged \$2 for hauling a loaded freight car and they hauled the empties back and forth free-of-charge and he says, "No, we didn't do that."

THE CHAIRMAN: What would your commission do, insofar as railway cars are concerned? I mean, if you had an independent commission and the railway was using their service, they would charge the railway.

MR. DARBY: I think they would charge a nominal charge for all freight, empty or otherwise; they would charge rates approved by the Board of Transport Commissioners.

THE CHAIRMAN: You do not want your freight rate increased by any change you are suggesting now?

MR. DARBY: No.

THE CHAIRMAN: Your rail rates, I mean.

MR. DARBY: No, not necessarily. They could perhaps stand a little increase but not any substantial increase. We do not want any substantial increase in rates. As a matter of fact, if our eventual submission is adopted, then I think the answer to the whole question is found.

THE CHAIRMAN: Get everything free.

MR. DARBY: No, not free; a reasonable rate. If it is not sufficient to provide the service, then it must be borne, under the Order in Council, by the Dominion of Canada.

COMMISSIONER INNIS: Have we a record as to the losses or gains of the railway in the separate accounts for the traffic carried?

MR. DARBY: It seems to me there was some evidence given as to that. Just where it is in the evidence, I do not know. I think it was stated that in some years there was a deficit; some years it was \$275,000. Then it climbed to \$400,000. Then in one year it was as high as \$800,000 approximately.

COMMISSIONER INNIS: That is the deficit?

MR. DARBY: Yes, charged as a deficit to car ferry operations. There again we say that is not right.

COMMISSIONER ANGUS: A higher charge now for carrying railway cars would only shift money from one government to another.

MR. DARBY: It would only shift it. As far as the operation of the railway part of it is concerned, we say the eventual incidence of the burden is the same. It comes out of the general pocket.

COMMISSIONER ANGUS: What advantage would you obtain through that difference in accounting?

MR. DARBY: I do not think the difference in accounting gave us any advantage at all. While under the Duncan Commission recommendation they did set up a separate system of accounts so that they could say how much deficit there was on the car ferry operation, that did not do us any good.

COMMISSIONER ANGUS: No. I mean if there were a higher charge for railway cars so that deficit was somewhat smaller, but the results of the Canadian National Railways is correspondingly worse, . . . would that help you at all?

MR. DARBY: It might very well to this extent; that if we go to the powers that be and say we would like to have another ferry, but that is going to cost you a few million dollars and they might say, "Oh, we paid ^a \$800,000 deficit on

this ferry account." Whereas if under normal operations it only showed \$100,000 deficit, they could say, "Well, this service is paying for itself; let us give them some more." So that if you are going to treat it as a business proposition and charge on the one score, I think in the end it would be better to have it.

COMMISSIONER ANGUS: The additional deficit on the second ferry would be the same in both cases, would it not?

MR. DARBY: I do not know. That would depend on how much of the piers and how much of the set-up that is established there is charged as part of this deficit. I do not know because I have not the breakdown of what that so-called deficit is.

COMMISSIONER ANGUS: I mean, if there were no additional railway cars being taken across because there happened to be a second ferry, if the number of railway cars was the same in either event the space obtained by a second ferry would be entirely for the automotive traffic, would it not?

MR. DARBY: Automotive, yes; that is right. But we say that if we had the means, we could expand. I will develop that to a certain extent when we deal with the freight rates problem.

(Page 22815 follows).

Now, I am not going to labour this point much more. The only thing that I would like to suggest is that we are concerned that that same attitude might continue in the future after this Commission is gone, and we would find them coming back and saying, "All right, for an automobile we are going to charge you so much, and for your trucks so much, and for any other service, and we will also keep and maintain our whole operation of that ferry to dovetail in with the railway service and not for the service of Prince Edward Island." That is why we ask that a recommendation be made that this whole ferry service be entrusted to an independent commission which would use it as an instrument of provincial development, coincident and dovetailed in with rail operations, rather than a rail operation which from its very nature tends -- I use the word advisedly -- tends to restrict all movement to such as is a feeder for rail operations.

The third item in our brief was that of zoning of Prince Edward Island. We have this anomalous dual zoning. I do not know whether your lordship and members of the Commission have had so many representations from the other provinces and the railroads since you left our part of the country that you may have forgotten this peculiar zoning system that we have. There is an inner zone, consisting of that range of Prince Edward Island from Summerside and a line drawn across there on the one hand, and Charlottetown on the other.

THE CHAIRMAN: At what page of your brief is that?

MR DARBY: That is at page 81. That is on our recommendation. Our submissions in relation to that, sir---

THE CHAIRMAN: Well, there are two freight zones now?

MR DARBY: That is right.

THE CHAIRMAN: You want that to be changed into one

freight zone?

MR DARBY: One freight zone for Prince Edward Island.

THE CHAIRMAN: You want the rates to be those which are now being applied to the inner zone?

MR DARBY: Well, as a matter of fact we prefer that, but I think as long as it was one freight zone, if the rates were a happy mean between the two, that would be perfectly satisfactory to the people of Prince Edward Island. But we do say that to have three zones in a small geographic unit like Prince Edward Island, with only one spout from which all its products can come out -- of course, from the point of view of rate-making of the railroad, they have very peculiar rules, and I do not think any layman could ever get to the bottom of the reasons why a rate is so much from one particular point to another, and it may be that there is some technical justification for it according to railroad practices, but we say that from the over-all geographic disabilities under which we labour in Prince Edward Island, one zone is the only logical answer. I think we had witness after witness who gave evidence as to how it militated against the disposal of our Island potatoes, particularly the evidence of Mr. MacFarlane in volume 26, pages 4918-4923, and so on.

THE CHAIRMAN: Is the whole of your grievance now based on the existence of two separate, two different, freight rate structures, charges?

MR DARBY: Yes.

THE CHAIRMAN: That is the whole case?

MR DRABY: The whole case as far as that zoning business is concerned. If it were one, fine, because they get a call from a purchaser in Jacksonville, Florida, and he naturally puts out his feeders to one, two or three

shippers in Prince Edward Island, and he gets a man in Charlottetown and he says, "All right, we will quote you for a carload of potatoes so much." From Summerside perhaps he will get the same quotation, because they are both in the same zone. Then he goes one mile or two miles west of Summerside, and he gets a price that is going to cost him anywhere from two to five cents a bag more, and that means anywhere from \$15 to \$75 more on a carload of potatoes, so he says, "Well, in the name of heaven, what is wrong down there in Prince Edward Island? Are they a bunch of---"

COMMISSIONER ANGUS: Does the same difficulty exist on the Mainland?

MR DARBY: Well, it is a different proposition. To the average person outside of Prince Edward Island, whether it is in Upper Canada or whether it is down in the United States, Prince Edward Island is just one little area -- "In the name of heaven, why can't they quote us the same price on a car of potatoes?" And oftentimes as a result of these mix-ups they lose sales, and heaven knows we---

THE CHAIRMAN: I suppose you have approached the railway from time to time to have a change made

MR DARBY: Yes.

THE CHAIRMAN: Well, what has been the answer? What reason has been given for not making the change?

MR DARBY: The usual technical ones. I do not know what the answer is.

THE CHAIRMAN: You do not know?

MR DARBY: Well, I mean, they say that in one section they apply the inner zone, the same rate to Halifax. We assume it is because the distance from Halifax to Montreal is the same as from Montreal to Charlottetown or

points within that zone. In the two outer zones they apply a rate because of the distance, which is only a few miles extra, the Mulgrave rate, and Mulgrave is another place over in Nova Scotia -- I presume the short difference in the distance.

THE CHAIRMAN: Then do you think that the railway could adjust their operations to the one zone principle and at the same time not make any loss in that way by, as you say, providing a mean rate? Is that so?

MR DARBY: Absolutely; that is our contention. They would not lose anything, and it would be a benefit to the people.

THE CHAIRMAN: Well, we will hear from them.

MR O'DONNELL: That is before the Board at the present time, that subject.

THE CHAIRMAN: I beg your pardon?

MR O'DONNELL: I think Mr. Darby will remember -- that is my memory of it -- that it is before the Board at the present time. You remember Mr. Matheson wrote a letter asking that the subject be delayed, so that it should not be dealt with until he had a chance to go into it. It is before the Board of Transport Commissioners, that whole zoning system.

THE CHAIRMAN: The whole zoning system -- do you mean in Prince Edward Island and other places?

MR O'DONNELL: I understand so, yes.

MR DARBY: The whole question of zoning in Prince Edward Island is before the Board of Transport Commissioners, but we are still faced with that same problem. If it is a technical matter of rate-making, possibly there is a justification for two or three different zones on Prince Edward Island, but our submission to your Commission goes beyond the fact of a technical rate-making, which is substantially

the position that the Board of Transport Commissioners take in dealing with these applications, and I think the Board of Transport Commissioners would welcome a recommendation from this Commission in that regard, because we refer to the attitude of the Board of Transport Commissioners in our brief at page 48:

"With regard to the regulation of freight rates the Board of Transport Commissioners in the above case" -- that was in the 21% Case -- "dealing with the matter of reducing rates to assist industry or to equalize through the prescription of reduced rates, production costs, geographical location, or climatic etc. conditions, a question particularly relevant to that application, stated at Page 54 of its decision:

"In so far as these different considerations are concerned, the Board can give effect to none of them in connection with any rate question. It has been held, time and again, that rate regulating commissions have no right whatever to attempt to equalize geographic, climatic or economic conditions. They are concerned singly and wholly with the question of the reasonableness of the toll which the railway company is seeking to correct for the carriage of a given commodity,"

THE CHAIRMAN: Is that not "collect from"?

MR DARBY: I think it should be "collect", yes -- "seeking to collect".

THE CHAIRMAN: "Irrespective of how it is made or whence it comes."

MR DARBY: "Or whence it comes."

THE CHAIRMAN: Was that in the 20% Case?

MR DARBY: That was in the first case, the 21% Case.

THE CHAIRMAN: That is the right description, is it, 21%?

MR DARBY: The 30% Case.

MR CAMPBELL: The 30% Case.

MR DARBY: It ended up as the 21% Case.

THE CHAIRMAN: How do your zones compare in size with other zones on the Mainland of Canada?

MR DARBY: I think that there are a great many other zones in Canada much larger than the whole of Prince Edward Island.

THE CHAIRMAN: What is your fear now? You say your problem is now before the Board; have you just read this quotation from the Board's decision in the 21% Case to indicate to us that they are not likely to give it proper consideration?

MR DARBY: Yes, that is what I feel.

THE CHAIRMAN: Well, do you say, then, that their power should be enlarged in that respect?

MR DARBY: Yes, I definitely do.

COMMISSIONER INNIS: Do you think there would be any complaints from those in the inner zone if you were to---

MR DARBY: No, I do not think there would be any. I think, as a matter of fact, we have had before the Commission in Charlottetown witnesses from all the different zones, and they all said as far as they were concerned they were perfectly satisfied to forego any advantage there was in order to get a general advantage for the producer in Prince Edward Island, because, after all, this potato business is one of our large items, and what is good for one is good for all, because a lot of the potatoes, Mr. Commissioner, are taken from one zone into the other in order to try to avoid this.

COMMISSIONER INNIS: Yes, one would expect that.

MR DARBY: Then they have to pay this additional handling charge, so in the end the one zone would look after the whole proposition.

THE CHAIRMAN: We will take a few minutes now.

(Recess)

THE CHAIRMAN: All right, Mr. Darby.

MR DARBY: The fourth item, my lord, with which I should like to deal shortly is our recommendation with reference to the Maritime Freight Rates Act.

I do not think that I will take any time to labour the point that has been made by all the other Maritime Provinces with regard to the discrimination against the long haul traffic as a result of these horizontal freight rate increases of 21% and 16%. I think if I were to do that it would only be needless repetition. We adopt the same argument that was used by Nova Scotia and New Brunswick.

THE CHAIRMAN: I see, though, that you link this long haul question up with the Maritime Freight Rates Act.

MR DARBY: Yes; because as far as our provincial position is concerned, as I indicated earlier, these horizontal increases, which apply more particularly to our long haul traffic, thus really work more both ways. We indicated in our brief, and I think that we substantiate it by the evidence that was called, that practically all our export and our import trade is long haul traffic. All the materials that enter into our cost of production are likewise subject to these increased freight charges, which naturally are reflected in reducing the net return to the producer. I think Mr. Barry yesterday well pointed out the distinction there between the effect of these increases on

the short haul and the long haul with reference to one particular instance where I think the reference was made that, while the increase was general all across the board, there was a million dollar -- no, I think he was dealing more particularly there with the suggestion made by one of the Commissioners as to if there was a general increase in prices wouldn't this lessen the effect by leaving your industry more prosperous. Well, in a sense that is true, but the net result is still there, that there is a lessened amount available to the producer, which is bound to have a considerable effect on the particular economy of the particular section of the country; and in Prince Edward Island the main effect works out, in the case of our potatoes mainly -- I don't know; we seem to base most of our argument on potatoes, although the same thing applies in the disposition of our other products, our livestock and our fisheries, but we have more or less indicated the effect of these increases on the sale of our potatoes.

THE CHAIRMAN: I suppose you agree with Mr. Barry and Mr. Smith in asking that the subsidy percentage be increased from twenty to thirty per cent in the Maritime Freight Rates Act?

MR DARBY: Yes, I think that is correct.

THE CHAIRMAN: And then you also ask to have the benefit of the Act extended to eastbound traffic.

MR DARBY: To eastbound traffic along certain lines.

THE CHAIRMAN: Yes. Agricultural machinery, automobiles, trucks, tractors, fertilizers, fishing equipment and fishing supplies.

MR DARBY: That is right, because that all enters into our costs of production.

THE CHAIRMAN: You go along with New Brunswick, then, don't you, on those points?

MR DARBY: Well---

THE CHAIRMAN: Or is there any difference between you, I mean in respect of eastbound traffic?

MR DARBY: No, I think we go along with New Brunswick, although we think that the suggested amendment made by Mr. Smith to section 325 of the Railway Act would be sufficient to provide the remedy.

THE CHAIRMAN: The remedy?

MR DARBY: That is, so that these---

THE CHAIRMAN: That would not give you the same benefits on eastbound traffic as on westbound, would it?

MR DARBY: Well---

THE CHAIRMAN: I did not understand that Nova Scotia was asking to have the remedy of the Act extended to eastbound traffic.

MR DARBY: No, I understand they do not. They simply want it extended on the westbound.

THE CHAIRMAN: Now, if you want something different, if you want the Act made to include eastbound traffic, you must not rely on the amendment that Mr. Smith proposed, because he did not have the intention of going so far as you want to go.

MR DARBY: Well, that might be.

THE CHAIRMAN: In any case, you do want this extension of the Act to eastbound traffic, on these commodities.

MR DARBY: On these specific commodities. I do not know whether we might have to eliminate the automobile, because it would be difficult to---

THE CHAIRMAN: Well, you told us on the Island that in your case the automobile takes the place of the horse and buggy elsewhere.

MR DARBY: Well, substantially; but still it might be difficult---

THE CHAIRMAN: It is part of the farmer's necessary implements.

MR DARBY: That is true; but, on the other hand, it might be difficult to---

THE CHAIRMAN: To justify it.

MR DARBY: To justify one particular instance of an automobile coming down as one or the other; so possibly, to avoid any suggestion that it might not enter into the cost of production, I think perhaps we would forego entering automobiles in that list.

Now I would just like to take a minute, when we are dealing with these increases---

THE CHAIRMAN: Do you mean horizontal increases?

MR DARBY: Yes, these horizontal increases, and how it affects our primary producers. I think I mentioned before, this morning, that in the month of April we managed to get clear of 1,415 carloads of potatoes. They were shipped by rail from Prince Edward Island. Now, the price for those potatoes was 46¢ per bushel.

THE CHAIRMAN: And there were about a million bushels.

MR DARBY: About a million bushels that we disposed of during that period. Now, most of those I believe went to Central Canada, a considerable portion of them. Originally it was pointed out in the evidence of Mr. MacFarlane, at page 4198 of volume 26, the rate per hundred pounds prior to 1948, prior to that increase, was 38¢ per hundred, and the freight charge on a carload of potatoes to Toronto was \$171.

THE CHAIRMAN: How much?

MR DARBY: \$171.

THE CHAIRMAN: On a carload?

MR DARBY: On a carload. After the 21 per cent increase came in the freight charge was increased to \$207.

THE CHAIRMAN: \$207 instead of---

MR DARBY: Instead of \$171. It is pretty close to \$207; it is \$206-something, \$207 in round figures.

Now, with the last increase of 16 per cent which was granted on March 23, 1950, and which applied in relation to these particular cars that I am going to mention, that brought the freight charge per car to \$240 per car.

THE CHAIRMAN: After the 16 per cent?

MR DARBY: After the 16 per cent increase was added.

THE CHAIRMAN: \$240?

MR DARBY: \$240. I think we indicated that all our potatoes from Prince Edward Island are sold on a delivered basis; I think that evidence was given by all the shippers.

THE CHAIRMAN: The shipper pays the freight; is that what you are saying?

MR DARBY: Yes, the shipper pays the freight. It is all shipped on a delivered basis. The shipper pays the freight. Now, on these last carloads that went out in April, that last 16 per cent represented \$33 per car, the difference between \$207 and \$240, \$33 per car extra.

THE CHAIRMAN: Can it be said in your case that the price of potatoes has gone up anyhow, and you are just as well off as you were?

MR DARBY: No, we are away off now. So that the producer got this \$33 less. Now, the sale price of these potatoes on the Toronto market during this period was from \$1.50 to \$1.55 per hundredweight.

THE CHAIRMAN: During what period?

MR DARBY: During the month of April.

THE CHAIRMAN: Per hundred pounds?

MR DARBY: Yes.

THE CHAIRMAN: What is the relation of the hundred pounds to a bushel?

MR DARBY: Sixty pounds to the bushel. That would be---

THE CHAIRMAN: All right, I have it.

MR DARBY: That would be a bushel and two thirds, I suppose.

THE CHAIRMAN: It is sixty pounds to a bushel?

MR DARBY: Yes, sixty pounds to a bushel.

THE CHAIRMAN: The same as wheat.

MR DARBY: That would give approximately a sale price per carload of \$900 per carload delivered. If you take that \$240 freight off, that leaves you \$660 net to the shipper, which means approximately 88¢ a bushel, because there are 750 bushels to the carload -- about 88¢ a bushel.

THE CHAIRMAN: How many bushels to a car?

MR DARBY: 750. But the prevailing price, all the shipper got, was 46¢. That is all that was paid. After all, that is what the shipper got. Now, the bags cost about 15¢ each, which would reduce your 88¢ back to 73¢. Then there are your handling charges and your shipper's commission, bringing us back to the amount that was actually paid to the producer, which was 46¢.

THE CHAIRMAN: That is, out of the 88¢?

MR DARBY: Out of the 88¢.

THE CHAIRMAN: Where does the rest go?

MR DARBY: Well, the bag itself is 15¢, then there are the handling charges from the time it is gotten from the farmer, trucked in, graded, and the brokerage commission. That was the price the farmers got; I got the report so that

I could indicate it to you here. The April price was 46¢ for everything, Cobblers included, for the month of April. In February it was a little higher; they got 46¢ for ordinary white potatoes, and they got a premium up to 75¢ for Cobblers; apparently Cobblers have a little better market for seed down in the United States.

COMMISSIONER INNIS: That 88¢ refers to what market.

MR DARBY: That would be the net result to the shipper from the Ontario market. Now, according to the evidence that was submitted before this Commission by Mr. Scales, the cost of production is calculated at \$200 per acre, and there was also evidence given that the average yield of saleable potatoes was 230 bushels to the acre, which would mean that the cost of production would be approximately 87¢ per---

THE CHAIRMAN: How much did you say? How many bushels to the acre?

MR DARBY: 230. That is the average, but in 1949 -- that is the crop that is being sold -- they had a rather phenomenally large crop, and I have been advised by Mr. Rogers here by wire that the average yield last year was 266 saleable bushels per acre.

COMMISSIONER INNIS: What would be a low crop?

MR DARBY: About 200, 180 to 200; an average, 230. Last year's was a phenomenal crop of 266. Now, working back from the 266 bushels per acre, the cost would be 75¢. At 230 bushels to the acre it is approximately 87¢. On 266 bushels, which was the particular yield for last year, 75¢. So this last freight rate increase just wiped out any profit there was at all.

THE CHAIRMAN: What is your suggestion, then?

MR DARBY: Well, our suggestion---

THE CHAIRMAN: If there must be an increase, how ought it to be arranged in affecting you?

MR DARBY: How is the---?

THE CHAIRMAN: How ought it to be arranged about potatoes? If there has to be an increase, and you show the bad results to you of a horizontal increase, what else have you to substitute for it?

(Page 22829 follows)

MR. DARBY: Well, the only solution we have is that the freight rates be reduced.

THE CHAIRMAN: Horizontally again?

MR. DARBY: Well, we have this one suggested remedy, of course, to increase the benefits of the Maritime Freight Rates Act.

THE CHAIRMAN: Yes, from 20 to 30%.

MR. DARBY: Yes, which would help to provide the cushion between a profitable and a non-profitable operation.

THE CHAIRMAN: But the figures you have given us are based on the yield to you after the application of the 20% reduction, are they not? You are now getting 20% off your freight under the Maritime Freight Rates Act.

MR. DARBY: Yes.

THE CHAIRMAN: Now, these figures come after that?

MR. DARBY: These figures are based on the current rate, that is the actual freight paid with the benefit of the subventions of the Maritime Freight Rates Act. Now, the only solution we can offer is to increase the benefits of the Maritime Freight Rates Act.

THE CHAIRMAN: Increase them by one-third; instead of 20 you have asked for 30?

MR. DARBY: Yes.

COMMISSIONER ANGUS: That would take slightly more than 10% off these figures, wouldn't it?

MR. DARBY: Approximately. It is only a partial remedy, but if we had the similar provision entering into the cost of production whereby our fertilizers and our agricultural machinery would also be subject to the benefits of a freight rate reduction, then it might mean the difference between having a profitable trade or not.

As a matter of fact, I mean, we have got to the saturation point. The last sales were actually at a loss, because 46¢ did not even on last year's basis -- 46¢ was a loss on the cost of production of that crop. Of course, one reason why the potato grower stays in existence at all is that often they do not calculate into their costs of production many of the factors that they should. They do not consider their own wages or the wages of members of their family that all buckle in and dig potatoes, that if they had to hire it would be an unprofitable operation. In other words they are making perhaps a sale, if we take the price of the cobbles, say they were sold in the month of February at 75¢. In that case he broke even on his actual costs of production. 75¢ was the cost of production for last year; 75¢ is what he got for his Cobblers. For the man who is in the business as such without family help, he just broke even.

THE CHAIRMAN: On this proposal to have the Maritime Freight Rates Act apply easterly as well as westerly can you tell us, Mr. Covert, just what is the position of Nova Scotia there? I don't think Mr. Smith made any reference to that in his argument.

MR. COVERT: No, my understanding is that Mr. Smith made no application for a change of percentage either way, or for application to the area, that there be no change in it.

THE CHAIRMAN: Pardon me, did he say that his province was against the proposed change?

MR. COVERT: They just didn't propose it, that is all.

THE CHAIRMAN: He didn't say he was against it?

MR. COVERT: No, my understanding was that he said he relied on the application of the maximum under

horizontal increases, that that would be the benefit they would look to rather than an extension of the application of the Maritime Freight Rates Act.

THE CHAIRMAN: Yes, but there are two different things. In the first place we were asked to recommend a change in the percentage subsidy from 20 to 30%. That was largely to meet the new condition created by other lower rates in other parts of the country. Secondly, we had New Brunswick and also the Province of Prince Edward Island asking us to recommend that the Act be extended eastwards as well as westwards.

MR. COVERT: Yes.

THE CHAIRMAN: And we had all that put before us, of course, when we were in the Maritimes, and I thought I had a recollection that Nova Scotia -- perhaps I am wrong there.

MR. COVERT: Yes, I think so. Mr. Smith stated yesterday, in my own understanding, definitely that they are asking for neither an extension of the area nor the percentage.

COMMISSIONER INNIS: Prince Edward Island comes about half-way between New Brunswick and Nova Scotia.

MR. COVERT: Yes, in my understanding New Brunswick asked for an extension of the percentage and they also asked that it be applied eastbound; and Prince Edward Island as a matter of fact asked that it be applied eastbound on certain agricultural implements and so on. I would say, my lord, that there was really no unanimity in the proposals of the three.

THE CHAIRMAN: No, I can see that.

MR. COVERT: But I thought Mr. Smith made it clear that the reason he was not asking for the extension was that he thought that they would be looked after if

their amendment to Section 325 sub-section 5 took place, that that would look after the long-haul; if there were a maximum imposed, that would satisfy them.

THE CHAIRMAN: Well, he did have a request to make about raw materials, didn't he?

MR. DARBY: Yes.

THE CHAIRMAN: Going easterly into Nova Scotia.

MR. COVERT: Yes, but I think he confined his remarks there on behalf of the Maritime Board of Trade. I think that was where that came in, but I think he made it very clear in his argument for Nova Scotia that they were asking for no extension of the Maritime Freight Rates Act.

THE CHAIRMAN: Insofar as your Island is concerned, I think you told us this morning you had no industries. Did you go so far as to say that?

MR. DARBY: We have no industries that produce an exportable article.

THE CHAIRMAN: And you have no industries that would be afraid of bringing goods from the east into the Island at too low a freight rate?

MR. DARBY: No.

THE CHAIRMAN: You don't care - -

MR. DARBY: We don't care how low they bring them.

THE CHAIRMAN: You don't care how general the easterly extension of the Act is made, is that it? You see, you are asking here that the Act extend eastward on certain specific commodities: agricultural machinery, automobiles (you have withdrawn that) trucks, tractors, fertilizers, fishing equipment and fishing supplies. I think Mr. Barry went further than that about New Brunswick. I don't think he specified anything, he was general.

MR. DARBY: I don't think we would have any

objection to making it general, although we were primarily concerned with the things that entered into our costs of production. We might be, the other articles. Well, we will ride along with New Brunswick, but that was not our primary intention. We were looking at this matter more or less from the point of view of what is going to help our economy and not just what is going to help us to get cheaper consumer goods of a luxury class perhaps.

COMMISSIONER INNIS: Coming back to potatoes, what would be the difference in the yield if it was a good farm with a good farmer, as compared with a relatively poor farmer?

MR. DARBY: Well, I suppose a poor farmer without proper fertilizer and without proper care of his crop, he might not get more than 125 bushels of saleable potatoes to the acre.

COMMISSIONER INNIS: And a good farmer?

MR. DARBY: A good farmer, last year he might get 300 bushels to the acre, might even get as high as 400; but the average of last year was 266. Of course, there are a lot of factors that enter into whether or not you might have one man with 20 acres of potatoes; he plants the best seed that he can get -- because all our seed now on Prince Edward Island is No. 1 seed because nothing else can be planted because of our Statute down there which provides that we are a certified seed area -- nobody except a man with a little patch on which he grows a crop to eat, can plant anything but a certified seed. But blight might strike one particular area and there is another disease like nematode which might strike another section which would wipe it out completely, and in those cases we quarantine that area and subsidize the farmer. Also if there is more than a certain percentage of blight,

that field is condemned from going on the markets, at all. These factors would enter into the general average yield of potatoes over the province.

COMMISSIONER INNIS: But the very good farmer would profit substantially?

MR. DARBY: Oh, yes, he could have a crop of perhaps 500 bushels to the acre which would perhaps produce him 300 bushels of saleable potatoes. Another man who who did not look after it as well, did not keep it as well, cleaned and weeded and perhaps did not spray as often, he might get 300 bushels to the acre perhaps, or 200 bushels of saleable potatoes.

COMMISSIONER INNIS: So that the penalty really falls on the poor man?

MR. DARBY: Actually, yes, the penalty falls on, well, perhaps not so much the poor man, the man who does not - -

COMMISSIONER INNIS: The poor farmer?

MR. DARBY: That is what it is, it falls on the poor farmer. Now, as to the fifth item, that is with regard to Rate Structure, Combination of Rates and Groupings, we just simply adopt the argument of the Transportation Commission of the Maritime Board of Trade and we add nothing to that.

On the sixth item, dealing with Feed Grain Assistance, we are simply asking that this be continued because that assistance is so vital to the maintenance of our livestock. That is on page 83, my lord.

THE CHAIRMAN: Yes, I have got it.

MR. DARBY: We cannot grow enough feed to maintain our livestock production unless this assistance is provided. Well, it would mean that the livestock^{producers}/would go out of business, the business would be seriously

handicapped.

Now, the next item is "Newfoundland Trade, I would like to make a few remarks with regard to that. With regard to the recommendation in respect of the development of Newfoundland Trade and coastal shipping, we have pointed out that the Province of Prince Edward Island is the logical centre of supply for most of the essential food requirements of Newfoundland and Labrador. We have the potatoes, the meats, the vegetables, the milk and the butter which they cannot produce and which we not only do produce but for which we are experiencing considerable difficulty in obtaining ready markets. In an endeavour to stimulate this trade a Crown Company, the Prince Edward Island Industrial Corporation, was created. It operates, as was indicated before your Commission, M.V. Eskimo. Already considerable trade has developed with the outposts on the south and west coast of Newfoundland. Now, with the expansion at Seven Islands, a new market can develop which might provide a substantial outlet for most of our agricultural products. Unfortunately we are lacking in proper facilities to develop the trade. One small boat is only a beginning and the rates which must be charged are almost prohibitive because they must conform with those obtaining on the railways' operations through North Sydney to Port au Basque.

(Page 22836 follows)

So our submission in that regard was that we asked that the benefit of the Maritime Freight Rates Act should be extended to cover shipments by water from Prince Edward Island ports to those of Newfoundland and Seven Islands. As we have indicated, and I am coming shortly to the end of what I have to say --

COMMISSIONER INNIS: Where is Seven Islands?

MR. DARBY: It is in Quebec.

MR. O'DONNELL: The new iron ore development.

MR. DARBY: Actually from the point of view of an agricultural market we are closer to that development than any other source of supply. Our industrial expansion, if any, can only be derived from three sources, our agriculture and its various phases, dairying, live-stock, potato production; fishing, and the development of our tourist business. Here is one prospect for agricultural development. We suggest to the Commission that it is within the broad scope of your terms of reference to consider the geographic disadvantage under which we suffer and recommend that the benefits of the Maritime Freight Rates Act be extended to that.

THE CHAIRMAN: To what?

MR. DARBY: To include shipments by water from Prince Edward Island ports to these outposts in Newfoundland.

COMMISSIONER ANGUS: I suppose that would become all the more urgent if the percentage of the Maritime Freight Rates Act was increased from 20 to 30?

MR. DARBY: Yes.

COMMISSIONER ANGUS: If you had to elect between the two things --

MR. DARBY: You mean to say would we rather have the 20% on this freight to Newfoundland or 30% --

COMMISSIONER ANGUS: Well, I do not quite mean that. Suppose it was decided to increase the percentage under the Maritime Freight Rates Act from 20 to 30 per cent and that the Act would not be extended to shipping. Would you welcome that outcome or would you rather remain at 20%?

MR. DARBY: Well, if we were not going to get anything else I would certainly insist on trying to get an increase --

COMMISSIONER ANGUS: Suppose it were a question of raising the percentage under the Maritime Freight Rates Act from what it is now, 20%, to 30%. Suppose it were decided not to extend to shipping whatever percentage might be given. Would you prefer to remain at 20% or would you like to go up to 30%?

MR. DARBY: I am still not quite clear --

COMMISSIONER ANGUS: I am really asking this. You now have the benefit of 20% under the Maritime Freight Rates Act.

MR. DARBY: Yes.

COMMISSIONER ANGUS: And you would like that to be extended to shipping.

MR. DARBY: Yes.

COMMISSIONER ANGUS: Suppose that request were to fail so that shipping has to take the handicap of the Maritime Freight Rates Act, whatever that may be. Would you wish to increase that handicap from 20% to 30% or would you feel that what you gained on freight rates on the Island was lost or more than lost by the handicap to shipping?

MR. DARBY: Of course I think rather than have nothing we would prefer to have the increase to 30% because the other is only a projected development. If

over a period of years we had found that we had developed a market there under which we could double our agricultural production then I think that it might be preferable to us to leave the 20% on the Canadian end of it and have that benefit extended to shipping to these ports rather than increase it on the one end. By so increasing it you would really be decreasing the benefit on the other end.

THE CHAIRMAN: You say here that the development of the Newfoundland trade is of considerable importance to the province. Is this something new altogether or has it already existed? You talk everywhere as if it is something new. You point out that Newfoundland needs these foodstuffs and that during the open season coastal shipping could maintain this service and at other times of the year air freight would assist. You talk about the early stages and say that in the early stages Dominion Government subsidies would be necessary. Is all this something new that you are seeking to create, or is there already a beginning there today?

MR. DARBY: I might say there was always a certain amount of sporadic coastal shipping between some of the Newfoundland ports and Prince Edward Island. This trade that we have tried to develop is a new trade from Prince Edward Island to these outposts around the coast of Newfoundland that were never served before.

THE CHAIRMAN: You say it is a new trade. Is there already a beginning of it at work?

MR. DARBY: Yes, we have had it in operation since last June. It started in June with the inauguration of the service by the Eskimo. I think it has carried nearly three-quarters of a million dollars worth of products during that period. As a matter of fact, just

before I came here there was a shipload left for Newfoundland, and the value of the freight was over \$80,000 in that one shipment. That was the initial cargo beginning this spring's operations after the ice broke.

THE CHAIRMAN: Where does this ship sail from?

MR. DARBY: It sails from Charlottetown and it goes all along the south and west coasts of Newfoundland. It makes a trip about every eleven days if the freight is available and weather conditions are favourable.

COMMISSIONER INNIS: I do not understand your reference to rates. Do you not set your own rates?

MR. DARBY: Yes, we set our rates but they are pretty high. If we cannot keep the rates down more the next thing we know we will be out of the market altogether.

THE CHAIRMAN: How do you bring the Maritime Freight Rates Act into relationship with this shipping enterprise?

MR. DARBY: To all intents and purposes it would mean a subsidy.

COMMISSIONER INNIS: A subsidy working in the opposite direction.

MR. DARBY: A subsidy worked out on the same basis as if it were freight, as if this was part of a rail operation.

THE CHAIRMAN: The shipper would pay only eighty per cent of the freight?

MR. DARBY: Yes, that is right, and the other twenty per cent would be made up by a subvention. Perhaps I might try to finish my part of the argument before the noon recess. The next item is transportation problems within the province. I do not think I shall labour that that to any extent. I think you know what kind of a rail system we have there, the grades, the poor roadbed,

the inability to haul heavy loads because of the curves and the roadbeds, the fact that thirteen loaded freight cars represent a fairly heavy freight movement on the Island.

COMMISSIONER INNIS: What has happened to the proposal for co-ordination?

MR. DARBY: I am coming to that. There is the slow movement of passengers on our Island trains. All that presents a picture of unsatisfactory movement of local traffic, passengers, l.c.l. freight and general freight on Prince Edward Island.

I think evidence was given before you about the movement of some l.c.l. freight from Charlottetown to Tignish, a matter of eighty miles, and it took eight days to ship this l.c.l. freight a matter of eighty miles. I believe that was in the evidence of one, Jerome O'Brien, Volume 26, pages 4891 and 4892. That is one thing.

(Page 22842 follows)

Then we have that system of rails that exists in Kings County whereby you go all over the lot. We have this train service that crosses the Hillsboro bridge and goes down to Murray Harbour. Then we have a train that proceeds down to Mount Stewart and goes on to Souris. Another branch goes down to Georgetown and Montague. Then the freight from the Murray Harbour line has to be brought up to a point at Lake Verde. Then they run across country over to a point near Mount Stewart and the freight is hauled back around and up that way.

I have prepared here a short note on this, but I see that the time is getting on. I was just going to say that it would be interesting for the members of the Commission to take a trip on this line just to see just what would happen. If you got on board at Charlottetown, you would go up to Mount Stewart, about ten miles up along the line, and about a mile to the east as you travel on, the train will stop and the conductor or perhaps some other courteous assistant on the railroad, will get out and say, "Gentlemen, would you like to walk around here for a little while or would you like to go on a side excursion?" I suppose you gentlemen would probably like to

experience all the delights of Prince Edward Island ' travel so you would say, "We will accept your invitation." So then you would leave that ^{main} line at Mount Stewart and would go across country.

THE CHAIRMAN: Would that be before we report or after?

MR. DARBY: I think we should have taken you on that trip before you report, my lord. So you proceed directly across country there, and get as far as Lake Verde, about nine or ten or twelve miles. You collect some freight there and you will be ready to carry

this freight along. Then before you go on, the conductor would come back to you and say, "Just a minute. Would you like to walk around this beautiful lake or would you like to go down to Vernon River?" You say, "I have heard that / ^{Vernon} river is a nice place." So they take you to Vernon. They back into Vernon, a matter of about ten miles and pick up some more freight there, and come back again to Lake Verde. You say to yourself, "Now, we are off." So back you go to Mount Stewart that you left a long time ago and where you might have left one of the Commission waiting there for a good many hours for you, and you go on then down towards Georgetown, the capital of Kings County. When you get about four miles from Georgetown, at Montague Junction, you would stop again, and the same very courteous conductor of the C.N.R. would approach you and say, "Gentlemen, would you like to walk around Montague Junction or would you like to go down to Montague?" Of course you would say, "I have heard that Montague is one of the beauty spots of Prince Edward Island, so we will go down to Montague." Back goes the train, no more than one hundred miles an hour, on our Prince Edward Island line, and you would eventually end up in Montague, pick up freight in Montague and then you would proceed on again to the Junction and then on into Georgetown. So that to cover this distance of about thirty or thirty-five miles from Charlottetown to Georgetown, it would have taken you about nine, ten, twelve, fourteen or perhaps eighteen hours. That is all right; that is Prince Edward Island patience. We have to put up with these things. What the solution is I do not know. You would have to either tear up all this track or straighten the curves. It might involve a tremendous amount of money. Perhaps it would not be a

bad idea. But part of the reason for this jigsaw puzzle of freight movements is the fact that the Hillsboro Bridge --

THE CHAIRMAN: What is that?

MR. DARBY: The Hillsboro Bridge over which this lower line would normally proceed from Charlottetown down to Murray Harbour is not apparently safe enough to carry the heavy freight cars. So instead of taking freight over the bridge from this particular section, they drop it off at this point at Lake Verde and make this roundabout trip to bring it up.

THE CHAIRMAN: Would this situation be remedied if the bridge was strengthened?

MR. DARBY: A considerable part of it would be.

THE CHAIRMAN: What is your recommendation about all this?

MR. DARBY: The only recommendation that I can see would be to recommend that a proper bridge, a proper railroad bridge, be built here that would carry the freight.

THE CHAIRMAN: Do you mention that here?

MR. DARBY: I think it is mentioned there, only incidentally on page 86.

THE CHAIRMAN: You say, "The case for assistance on bridges is even more acute financially."

MR. DARBY: Yes. We have considerable difficulty.

THE CHAIRMAN: That seems to apply more to road traffic than to rail.

MR. DARBY: We have got so used to these anomalous services that I suppose we forgot to protest against that one specifically, except as part of the other. The bridge has to be built either by the railroad or as part of the trans-Canada highway system.

THE CHAIRMAN: What do you call this bridge?

MR. DARBY: The Hillsboro bridge.

THE CHAIRMAN: Is it a combined railway and road traffic bridge?

MR. DARBY: Yes.

THE CHAIRMAN: That is the Hillsboro bridge?

MR. DARBY: As a matter of fact, it is an old second-hand bridge they hauled down there as being good enough for Prince Edward Island, and stuck it there about 1903. The passengers and automobiles are allowed to cross over it when the trains are not there; that is, passenger trains. We pay the Dominion Government the annual rental of \$9,750 for the privilege of crossing over that bridge.

THE CHAIRMAN: Would it mean rebuilding it?

MR. DARBY: It would substantially mean rebuilding the bridge completely.

THE CHAIRMAN: It would it mean rebuilding it.

MR. DARBY: Yes. We feel that that should be done either by the railroad or conjointly by the railroad and the federal government. If the trans-Canada highway, as it must, crosses there over the Hillsboro River to get from Borden on the one end and Wood Island on the other, which is the other outlet or proposed outlet for the trans-Canada highway -- if it crosses over there, the bridge can be built but the cost is borne half by the dominion and half by the province.

THE CHAIRMAN: What about the railway? You say it is a joint railway and road bridge. Is that it?

MR. DARBY: That is right. As to the railway, I think their attitude is this: "We do not want to contribute to the cost of this because we would like to pull out of it altogether."

THE CHAIRMAN: But you say it will be part of the

trans-Canada highway system?

MR. DARBY: Part of the trans-Canada highway system, yes, if we can ever afford to have it built. It has been estimated that it will cost \$5 million. The Province of Prince Edward Island is too poor to put up \$2,500,000. But if the federal government would put up \$2,500,000, and the C.N.R. would put up one-half the obligation, we might be prepared to finance the other half. I think this is one time when Prince Edward Island should get a break.

I shall be only about five minutes more, but I see that it is one o'clock.

THE CHAIRMAN: All right. We will adjourn now.

---The Commission adjourned at 1.00 p.m. to resume at 2.45 p.m.

Ottawa, Ontario.
Tuesday, May 16, 1950.

AFTERNOON SESSION

THE CHAIRMAN: Go on, Mr. Darby.

MR. DARBY: My lord and Commissioners, in closing at noon recess I was dealing with some of the transportation anomalies as they existed within the province itself. I mentioned the state of the rails, the slowness in the movement of freight and passengers, the peculiar situation that existed down in the eastern end of the province, and I also mentioned the bottleneck, as you might call it, that now exists at the Hillsboro Bridge.

Along the same lines is the matter of the delays in the forwarding of rural mail, especially west of Summerside and east of Charlottetown. For example, if an air mail letter goes down from Ottawa to Charlottetown, it might come down in two or three hours, it stays in Charlottetown overnight, it is then put on a train the next day and it is hauled out to the various centres in the eastern part of the province, sorted that night, and it gets out the next day by rural delivery. Now, ^{that} creates a service that is more or less intolerable. There is no reason why, my lord, even mail that crosses over with the ferry, and crosses at the proper time on the afternoon crossing, should not get to Charlottetown by 6.00 or 6.30 and then be routed on. There is a feature that could well be removed by a coordination of bus and other services.

I had first intended to deal with the coordination suggestion in our brief, but I find on consultation with my colleague here that we had allocated that feature for his part of the submission before your lordship, so that I will not deal with that any further.

There are three other items that we mention in our formal brief. There is the matter of the Trans-Canada

Highway and the West Prince-Buctouche Ferry, and also I believe the endorsement of our Province of the proposal made by New Brunswick for construction of the Chignecto Canal. In view of the hour, and of the fact that a large portion of the argument is still to be dealt with, I do not think I will labour anything in relation to those three items. I think as far as we are concerned our submissions in that regard are contained in the formal brief.

So my part of the argument, sir, I will now conclude. I wish to thank you for your patience in listening to me, and, as I said in the beginning, this Commission has proved a very happy one for the Province of Prince Edward Island, and we trust that it will continue to have that same happy bearing on our Province.

THE CHAIRMAN: Thank you. We will consider your invitation.

ARGUMENT BY MR. CAMPBELL

MR. CAMPBELL: May it please the Commission:

It was no trite platitude expressed by my learned colleague when he told the members of the Commission that the very fact of the Commission's existence has already been of inestimable benefit to the Province of Prince Edward Island. In fact, as I have mentioned to my friend Mr. O'Donnell, the railway has become so friendly and has appeared to be willing to cooperate to such an extent that your Commission is perhaps not relieved but placed in a rather enviable position in certain respects merely perhaps of requiring to commend certain things that have been done rather than recommend them.

More trains have been on time since your Commission sat in Charlottetown; not so many trains have been lost in

the New Brunswick woods; we recommend some matters in connection with the Trans-Canada Highway in our brief, and an agreement has been signed in that connection. We recommend the matter of coordination between rail and bus services, and for the more expeditious transportation of mails to the outlying districts, and I do not think I need to request from this Commission any very serious consideration of this problem, because the railway has approached the Government of Prince Edward Island within the past few months with a concrete proposal for coordination of rail and bus services, the buses to be operated by the railway. That is one proposition. We countered with a proposal that we would prefer to see the existing bus services used if at all possible in this coordination scheme, and that is being furthered, I think perhaps as expeditiously as possible, at the moment. The present bus company is in touch with Mr. Donald Gordon's lieutenants, and I believe that all that this Commission would need to recommend in that regard would be that it seems highly desirable that such coordination should be effective.

With respect to the second car ferry, as my friend Mr. O'Donnell pointed out, at page 20401, Volume 111, Mr. Frawley says:

"MR. FRAWLEY: Is that the new ferry as announced in the paper to-day, putting on a second ferry?"

MR. O'DONNELL: No. That ferry is referred to, but this statement has nothing to do with the statement you refer to. I happened to hear the Minister yesterday making the statement in the House"-

now, whether my starting for Ottawa had anything to do with it or not, my lord, the "yesterday" referred to was the day I started for Ottawa on this occasion -

"and he said that during the summer months this year they have agreed to experiment with the operation of two ferries" -

now, my lord, they have been experimenting with the operation of one ferry entirely too long. I hope they do not mean that, that they are going to experiment again -

"during the tourist season, on the assurance from those who asked for the service that the additional revenue to be derived from the operation of the second ferry would more than pay for the expense; and the Minister stated that in those circumstances they would experiment with the proposition for one year,...."

Now, there were some letters appeared in the press, some statements were made in the House of Commons, and the first reaction, and the reaction of those people who wrote those letters and made those statements, was a critical one, because - I need not again refer to the Terms of Confederation, as mentioned by learned friend this morning - there should be no strings attached to any ferry service to which we are entitled, that it should pay for itself. That has been established, that has been written in the bond, in the Terms of Confederation under which we joined Canada. But I do not think that we should adopt too critical an attitude toward the Minister in that respect. After all, the Minister is a man charged with large responsibilities, he is looking at the whole national picture, and he stands in the House of Commons, and it appears that he is giving an extra ferry to a small little place of 90,000 people; he is going to be approached from all over Canada with demands and counter-demands. I do not think we need worry very much about the little rider he put on there, that the second car ferry has to pay for itself. All we need is that the service be instituted.

As a fact, Mr. Chairman, I had proposed, thinking over in the early stages as to just what I should ask this Commission in respect of the ferry, that I thought this Commission might well look down at Prince Edward Island and say, "Now, look here, there are a large number of complaints about the way this ferry is running, about these delays, and we find you have two ferries down there. It is true that one is tied up. Now, put the two of them in operation for a period and let us see what happens." The Dominion Government has already done that - at least it goes into operation in the middle of June - and therefore I submit, my lord, that the task, which I think is a pleasant task, of this Commission would be to place its imprimatur on that action of the Dominion Government, and its imprimatur plus on that action, plus on the one hand the length of the season. I think that three months is an insufficient time.

I realize, my lord, that we cannot ask for a year-round double service. We are bounded in the spring and fall by the two drydocking periods; that is, if you are operating two ferries, one of them will normally go in drydock in the spring and the other one in the fall. Now, the new big ferry, the "Abegweit", it is conceived by those engineers in charge, should come up the St. Lawrence for drydock, as there are no proper drydocking facilities in the Maritimes. As to that I do not know, but that is what the engineers think.

(Page 22854 follows)

That being so, we should not recommend their coming up the St. Lawrence before it is really free of ice, so she cannot come up here until, say, some time in May. Therefore we are pretty well bounded by, say, 1st June and, let us say, 1st October. It is not a very long extension, but I think there should be an extra month plus in the Commissions imprimatur of the action of the Dominion Government in this regard, that we should have one other month added to this service, that is, the service should be for all summer, consistent with proper engineering dry-docking facilities.

THE CHAIRMAN: Would you bring it back to 1st June or extend it in the fall?

MR. CAMPBELL: Well, my lord, that would be a matter entirely for the engineers with regard to dry-docking. I think it should cover the entire period between the two proper dry-docking times. I think the imprimatur plus should extend further to the operation of these ferries by either the Department of Transport or by an independent commission. I do not think the Dominion Government would strongly insist otherwise.

In the same Volume which I cited a moment ago, Vol. 111, at p. 20406 in the statement filed by Mr. O'Donnell at that time, appear the words: "The necessity of tying the ferry schedule with train schedules seems obvious, while train and ferry schedules looked on as a whole maintain a reasonable on-time performance." What is the use of Mr. O'Donnell filing a matter like that side by side with Exhibit 90? Exhibit 90 and this material filed by Mr. O'Donnell placed side by side, on a reasonable on-time performance.

I was interested this morning in the question of Dr. Angus as to whether it would be feasible to hold

up a train because the ferry was not there. Now the answer to that is simply this. If we have two ferries operating, through the period when two ferries are operating, an hour is the crossing time, fifty-five minutes. Now, let us add a half-hour for transactions at each end, so that every hour and a half you have a ferry leaving both sides. Well, the Commission will recall from Exhibit 90 how much a half hour -- the average length of time then in any one-and-a-half hour operation, the mean is three quartess of an hour. So that even if a train just missed one ferry, it would only be delayed three-quarters of an hour, and from our perusal of Exhibit 90, what is three-qurrters of an hour to the Canadian National Railways when it gets to Prince Edward Island? Most of the time it would not be just at the mean; there might be odd times when it would be longer, and there might be many times when it would be a shorter time.

As regards the travelling public, and after all the terms of Confederation said:-

"Mails and passengers means in this
day passengers travelling by automobile"

Now, that is clear from the reference I gave the Commission earlier, the judgment of the Privy Council in Volume 36, page 6834 of the record:

"MR. CAMPBELL: The Attorney General
for Ontario against the Attorney General
for Canada, 1947, Appeal Cases, pages 127.
I will read a sentence from page 154:

'It is, as their Lordships think,
irrelevant that the question is one
that might have seemed unreal at the
date of the British North America Act...'

Now, at the date of the British North America Act there were no automobiles. Passengers either went on foot or some other means of conveyance, perhaps on a horse.

"'....To such an organic statute a flexible interpretation must be given which changing circumstances require.'

" And that was also the view of the Canadian Parliament shortly after the time of Confederation. I refer the Commission to a report of a Committee of the Privy Council of Canada, approved by His Excellency in Council, 17th November 1885; to be found in Sessional Papers for 1886, Sessional Paper no. 76, p. 24 of that Paper:

'It is proper to assume that both contracting parties to the Union, understood that the Dominion Government would provide and maintain the means which science and experience might determine, as the best and most efficient for the end in view within the range of possibility.'

THE CHAIRMAN: What is that Privy Council reference?

MR. CAMPBELL: That, my lord, is a report of a Committee of the Privy Council of Canada, approved by His Excellency in Council in 1885. It is found at page 6834 of the Transcript. I was just reading from that page of the record, Volume 36. It is all set out there.

THE CHAIRMAN: Now then, where is that Privy Council Case? I mean the British - -

MR. CAMPBELL: The Privy Council British one is the Attorney General for Ontario v. the Attorney General for Canada, 1947, Appeal Cases 127. So that we have 1885 saying the same thing as 1947.

I could have wished that your Commission would be a continuing one till the end of September. We might now have this experiment worked out, but I submit that so long as the railway has it there in the record that the ferry must be tied to the train, so long there will be that difficulty. If the train is two hours late, the ferry is; both sides are held up for two hours. The ferry cannot come down in the middle of the stream and hang around while the other one is waiting to get away. They must leave both sides at once.

However, as I have mentioned earlier, we have much happier relations now with the C.N.R. than we had at the commencement of this Commission's sittings. The C.N.R. paid us the compliment of concluding their case with a special reference to Prince Edward Island. I might just mention in passing here that I ^{had} have the most pleasant relations with both Mr. O'Donnell and Mr. Friel in relation to getting information required for the use of this Commission. We want to be friends with the C.N.R. and I think they want to be friends with us. One reason they would like to be friends with us, for instance, is that the Commission will notice from the map which is appended to the C.N.R. Brief where the lines are coloured in different colours indicating whether a line is a feeder line or unproductive or revenue line, that the line from Emerald Junction in Prince Edward Island to Sackville is a green line. That is a productive, freight-producing, revenue producing line to the C.N.R. They

want to be our friends and we want to be their friends.

If I may say, my lord, just at this moment, because I must hurry on, that when I came to Ottawa I happened to meet the day before I left, Mr. Montgomery, the Superintendent in Charlottetown, and I told him I was coming by car and asked him what about crossing on the way back. He told me they were operating pretty well round the clock, and since I have been in Ottawa I have received a letter that he caused to be sent telling me to ask in Moncton and I would know just when the boat was leaving and so on. So, as I say, they are quite friendly.

Now, with the permission of the Commission, because there is not very much time this afternoon and I would like to finish, I will pass on to Part III of the Prince Edward Island Brief, namely our argument for nationalization of the railways of Canada. At the outset I would like to make this statement - -

THE CHAIRMAN: I suppose you are strengthened in this by the very greatly increased friendly attitude of the Canadian National Railways?

MR. CAMPBELL: It has not dissuaded me any more. At the outset I might say just in passing that we are in Prince Edward Island, we are not socialists we are not communists, and we do not believe in State control for the sake of State control. I recall some twenty years ago when acting upon instructions from some principals in St. James St., we introduced into Prince Edward Island what were known as domicile companies, something along the lines of the Delaware Corporation, and we have had considerable success with that until the transference of the succession duties to the Dominion. One of the things that one of my St. James St. principals did at that time, which I think was rather clever, he was introducing the

idea to his London ^{capitalists} and he sent them a copy or copies of the Prince Edward Island Telephone Directory, so that there they could see on the printed page our British, Irish, French ancestry, but we did not have any bolsheviks and communists and people of that nature down there. We, as I say, are a stable, conservative people in Prince Edward Island. We are not socialists. We do not ask for nationalization of railways because we believe that State control in itself is preferable to private enterprise.

Now, to commence my argument as if this were an ordinary lawsuit, with pleadings filed and the form of submissions by the various provinces, by the railways, I would at this stage ask for a judgment by default. Since the Brief of Prince Edward Island was printed and filed and handed to all the Provinces, handed to all those present, my lord, to the Attorneys General of Quebec and Ontario (from whom we received polite acknowledgements and nothing else); from that day until this, on the record, in the pleadings, there is no word in defence, no defence has been filed. One sentence : tucked away in an Appendix to Part II of the C.P.R. Brief says:-

"The Canadian Pacific is not in favour of the amalgamation with the Canadian National." One sentence in an Appendix to Part II. All the other provinces are silent and, as I say, if this were a lawsuit, I would ask for judgment by default.

THE CHAIRMAN: Doesn't the Canadian Pacific say some place or other (I think in two or three places) that unless certain things are done, the Government of Canada may be confronted with the necessity of taking over the C.P.R.?

MR. CAMPBELL: Yes, my lord, but I was speaking of the pleadings against my own.

THE CHAIRMAN: Yes, I know. Oh, just against?

MR. CAMPBELL: Yes, that was the only pleading, the only denial of my pleading on the record.

THE CHAIRMAN: Did not some of the 'labour representatives also in their evidence bring that out? They are opposed to unification in any form?

MR. CAMPBELL: Yes, some of the labour people. I am talking now of the people in the record, only of the record, the parties to the proceedings.

THE CHAIRMAN: So you think you can ask for a verdict - -

MR. CAMPBELL: Well, my lord, if this were a lawsuit I would ask for judgment. However, I do not need to do that, my lord. On the record itself I will ask for judgment on the merits, and to shorten my argument I would like to point up the matter with the permission of the Commission by reading two or three pages from Volume 120, page 21696 from the argument of Dean Cronkite. Now, Sasktatchewan came the nearest to any other Province in agreeing with Prince Edward Island. At page 21696 of Volume 120, the following discussion occurs:-

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"THE CHAIRMAN: Your Province doesn't advocate anything?

MR. CRONKITE: No, except that I would like to elaborate a little on that, but I will give you a straight answer. They haven't the answer, they don't know one way or another, but they would like some information.

The position of the Province was exactly what it was stated to be. The Government had no doctrinaire views either for or against nationalization. It did not have the facilities for a proper investigation and the problem lay in the national rather than in the Provincial field, and it is not too good to be giving advice to other people. It was realized that the Canadian Pacific Railway had provided transportation services for a great number of years and that an affirmative answer to the question presented would require good reasons, reasons looking in the direction of advantage to the people of Canada. Nevertheless, it was evident that the Canadian National System had made great progress over the last few decades and that certain privately owned systems had not done at all well, some years ago, necessitating their nationalization by the Dominion of Canada. It was also felt that alleged difficulties in co-operation among or between the existing railways might be more easily solved under public ownership. Hence, it was thought that the question put was a pertinent one, particularly to a Commission enjoying such wide powers of investigation.

I should say, and I omitted to say in the written text, that one of the features that the province would be quite unable to go into and get any answer to is the matter of co-operation. It is undoubtedly beyond the position

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of the province to do that.

"THE CHAIRMAN: Are you bringing in co-operation there?

"MR. CRONKITE: I am going to say more about it.

"THE CHAIRMAN: You mean co-operation under the statute?

"MR. CRONKITE: Between the two railways under the Canadian National-Canadian Pacific Act.

"THE CHAIRMAN: Why do you mention that here?

"MR. CRONKITE: I say that is one of the things that the province would like to investigate but is not in a position to do it itself.

"THE CHAIRMAN: You raise that later on?

"MR. CRONKITE: Yes.

"THE CHAIRMAN: You know our commitment in that respect. It is to report on the results achieved by the operation of that Act, and I think to suggest any amendment or otherwise. Just let us make sure about that. We are to:

"....review and report on the results achieved under the Canadian National-Canadian Pacific Act of 1933 and amendments thereto, making such recommendations as the present situation warrants."

Are you going to make any recommendations to us, which you think the present situation warrants?

"MR. CRONKITE: No, sir.

"THE CHAIRMAN: I see.

"MR. CRONKITE: Except maybe incidentally. Maybe it is involved incidentally in some observations I make. But I should like to make the position of the province clear here, that on any problem of nationalization, the extent of the possibility of co-operation between the two

great railway systems is a relevant factor.

"THE CHAIRMAN: You mean as an alternative to nationalization?

"MR. CRONKITE: Yes.

"The evidence submitted to this Commission over the past ten months has merely served to strengthen the conviction that the suggestion, put forward on these three occasions by the province of Saskatchewan, should receive very serious consideration. Somewhat paradoxically the evidence submitted by Professor McDougall on behalf of the Canadian Pacific Railway lends, perhaps, the strongest support of all to the proposition that public ownership of all railways may have a contribution to make to the solution of Canadian Transportation problems.

"THE CHAIRMAN: You call it a contribution. If you have Government ownership, that is very complete, definite and final solution, is it not, and not a contribution?

"MR. CRONKITE: I would hate to say it would be a complete solution. It would be final.

"THE CHAIRMAN: It would oust everybody else.

"MR. CRONKITE: That might not be the solution for the freight users.

"THE CHAIRMAN: The responsibility of the railways functioning is thrown on the Dominion Government.

"MR. CRONKITE: Yes.

"THE CHAIRMAN: I do not see how you can call it contribution.

"MR. CRONKITE: What I mean is this. It might be more satisfactory to the users of freight services.

"THE CHAIRMAN: Is it not one of these things that, once done, can only with the very greatest difficulty, be undone?

"MR. CRONKITE: That is quite true.

"THE CHAIRMAN: It would have to be final, it seems to me.

"MR. CRONKITE: Looking at history, the movement has been from private to public rather than from public back to private.

"THE CHAIRMAN: History bears that out, I think.

"MR. CRONKITE: Yes, certainly. That is one of the reasons why the Province of Saskatchewan does not desire to be doctrinaire in that particular."

* * * * *

Now, that points up what has been said so far principally on the matter of nationalization. Mr. Cronkite says that there would have to be good reasons why we would have nationalization: "That an affirmative answer to the question presented would require good reasons". Now, my lord, and members of the Commission, the best reason why we should have nationalization of the railways of Canada is that the present system does not work.

THE CHAIRMAN: You say the present system does not work?

MR. CAMPBELL: Yes.

THE CHAIRMAN: Does the Brief of the Province show wherein the present system does not work?

MR. CAMPBELL: I propose to show that in a moment from the record.

THE CHAIRMAN: I mean, there is no chapter and that sort of thing in your Brief?

MR. CAMPBELL: Well, in a general way.

THE CHAIRMAN: All right.

MR. CAMPBELL: I propose now to deal with the record. The system, in fact no system that we have ever

had in Canada of railways, has ever worked. In 1917 the system we then had did not work, and the Drayton Commission was obliged to nationalize most of the railways with the exception of the C.P.R. Following that the system did not work, in 1918 and . 1921 when Lord Shaughnessy proposed that the C.P.R. should be owned by the Dominion Government and all systems operated by the C.P.R. as a management. The system didn't work, and in 1930 and 1935 the Duff Commission thought that perhaps co-operation would make the system work, but when Sir. Edward Beatty did not think so.

At the risk of being tedious for a moment or two, I would just like to have in the back of our minds what Sir Edward Beatty did say, and I am reading from page 106 of our Brief:-

"If were mistaken in our appreciation of the value of competition, or did not sufficiently realize the waste and losses it involved, and especially involved in railway competition between the Government of Canada and a private company, should we perpetuate another fallacy on the assumption that we can have competition and co-operation, that we can struggle for conflicting interests and yet not conflict? Why delude ourselves into the belief that we are supermen, indifferent to the spirit that competition and contest provoke, that we can maintain our own traffic and revenues and yet divide them, that we can act like enemies and friends at the same time and, lastly, that we can afford to do the things we cannot afford to do and perpetuate the waste we cannot afford to perpetuate.

AND BEATTY AGAIN AT WINNIPEG ON FEBRUARY 8, 1933:-

"Some of the proponents of continuation of the present situation begin and end all arguments with the simple phrase: 'It is against the interests of this country.' I often wonder if those who so complacently use this argument ever seriously consider what the interests of Canada are. Do they consist, in their estimation, in the maintenance of two systems operating in competition and under the hazard of possible bankruptcy, or in a unified system which will provide adequate facility to all parts of Canada, with economy in operation and administration not possible of attainment by any other method?

"No scheme of co-operation between competing companies, however far it may be pursued, will effect these essential economies without risk to the integrity of one property or the other, and corresponding damage to Canadian credit.

"The necessary economies can be reached through some form of Unified operation and control. It can be done without drastic impairment of the service necessary to our industries and to our economic stability. The management would have to be armed with authority to accomplish them with the least possible disturbance, and without calling on any section of the community to carry an unfair burden of sacrifices. I believe it is possible to do all this, and yet to surround the operation with safeguards sufficient to relieve the anxiety of those most obsessed with the dread of monopoly.

"I am unqualifiedly in favour of unification of these properties for the purpose of administration. Most careful and comprehensive enquiries by the officers of the Company have persuaded me that under unification permanent economies of seventy five million dollars a year will be secured after a reasonable period has elapsed to permit adjustments to be made in an orderly way. These economies are not of the temporary or distress variety which the depression has forced upon us, and they are not designed to eliminate any essential service to the public or remove trackage where its retention is necessary in the national interest, and where there is not already in existence another facility capable of adequately providing for traffic needs.

"It is only right that I should point out to you two things which will have a great effect on the wisdom or otherwise of this policy. The first is that unification, of necessity, will lessen the extent of all capital expenditures for many years, because the unified company will have for joint use all the facilities, trackage, motive power and rolling stock of both companies.

"The second important question is that which arises from the fact that because of the heavy accumulation of debt and of the enormous losses incurred in prior years, we must not only restrict our expenditures in the future, but we must improve our revenue position to the extent of being able to replace gradually the moneys so lost. We must reduce the drain on the public exchequer, and with wise administration and normal conditions, it is not too much to expect that in time not

the first of the year.

The second of the year.

The third of the year.

The fourth of the year.

The fifth of the year.

The sixth of the year.

The seventh of the year.

The eighth of the year.

The ninth of the year.

The tenth of the year.

The eleventh of the year.

The twelfth of the year.

The thirteenth of the year.

The fourteenth of the year.

The fifteenth of the year.

The sixteenth of the year.

The seventeenth of the year.

The eighteenth of the year.

The nineteenth of the year.

The twentieth of the year.

The twenty-first of the year.

The twenty-second of the year.

The twenty-third of the year.

The twenty-fourth of the year.

The twenty-fifth of the year.

The

The twenty-sixth of the year.

The twenty-seventh of the year.

The twenty-eighth of the year.

The twenty-ninth of the year.

The

only will the full interest due the public be available to the owners of the National Railways but a substantial mount in addition which will go to provide interest on the money advanced by the Government on which no interest has as yet been paid.

"We in Canada have been prone to greatly exaggerate the value and benefits of competition and to disregard the cost and waste incident to it. We have also established a kind of competition which is, so far as I know, peculiar to this country namely that between the State itself and a private corporation. That species of competition contains elements of injustice to private investors which is inescapable, and the wonder is that it could have continued for so long a period without more disastrous consequences than we have experienced.....

"The principle of co-operation without consolidation has been recently approved by a committee of the Senate, no doubt in the view that this should be fully tried out before adopting more extreme measures, but I remain of the opinion that it is in the interest of Canada that more drastic measures should be taken at as early a date as possible....."

(Page 22869 follows)

At page 109

"There are some who suggest the solution to the railway problem is to be found in an increase in freight rates. It is true that our rates are among the lowest in the world, as I have already said, and in some cases they may be unnecessarily low. The freight rate structure is, however, a complex affair, and radical changes in it may produce unfortunate effects. A considerable increase in the rate on any major type of traffic, could scarcely fail to be damaging to the national interest, and for my part, I should regret to see this tried until everything possible has been done to eliminate waste in our transportation system."

The system, then, did not work, before this last war, nor has it worked since. And the amazing fact, the amazing thing to me, my lord, is that we are now at Volume 127 today, and not one witness has gone on this stand and said in terms that the present system works, that it is a good system. Not one witness who has appeared in the mass of evidence which has been given before this Commission has gone on the witness stand and said that this system of competition between a private enterprise and the Government of Canada is a good system and that this system ought to be continued. Surely there should be one witness to say that.

THE CHAIRMAN: Have not several of the provincial representatives told us that they wish the Canadian Pacific to be continued as a private enterprise? They have, you see. Isn't that, indirectly at least ---

MR. CAMPBELL: Indirectly, yes, my lord, indirectly, but surely there should be one witness to say it directly.

Now let us see what Mr. Walker, the President of the Canadian Pacific, says. Surely he should have been a person to say that. In Volume 65, at page 13573,

"Q. On page 91, paragraph (d), I should like to take this paragraph sentence by sentence and see if there is any agreement at any time.

'It is obvious that if railways are to continue to meet the needs of United States and of Canadian transportation, new capital will be constantly required for extensions, improvements, rolling stock, and other capital facilities.'

Is that all right so far? Do you agree with that sentence?

A. Yes.

Q. 'This future capital can only come from two sources, the Government or the owners of private capital.'

A. I agree with that.

Q. 'But private capital is only likely to seek investment when there is a reasonably sure return.'

A. I agree with that.

Q. 'But, due to the conflict between, on the one hand, rising operating costs and taxes upon railways, and on the other, a constant and strong demand for reduction in freight and passenger rates, it becomes increasingly evident by examining the financial record of North American rails over the last three decades that the return to the private investor has been declining.'

A. I think that is probably the general trend, although there have been many intervals when it was not true.

Q. 'Indeed, since 1931 it has disappeared in

many instances.'

A. Notably in the case of the railroads that went bankrupt in the United States.

Q. And in the case of your own railway which ceased to pay dividends?

A. Yes.

Q. 'If this decline continues, then ultimately no more private capital will be invested in rails.'

A. Yes, but that is based on the premise that operating costs and taxes on railways will continue to increase, and that the rail rate level will not keep pace with it.

Q. So that you must have higher freight rates or less operating costs?

A. One or the other, yes.

Q. And the only alternative to that is government aid?

A. Oh, no.

Q. Let us see where the fallacy is.

A. I do not see the objection to higher freight rates when the general price level of the whole community rises.

Q. I was not speaking of any objection to it, Mr. Walker. The railway must have more revenue?

A. Or less expense, yes, I agree.

Q. And the only alternative to that comes from the government or bankruptcy?

A. Yes.

THE CHAIRMAN: Q. How might less expense be brought about, Mr. Walker?

A. Well, Mr. Chairman, it is not inconceivable that wages will eventually go down instead of going up. I think it is quite possible that there will be a material

reduction in the price level from the present inflationary level."

Now, there, my lord, is the presumably considered answer of the President of the Canadian Pacific Railway as to the only hope he has of avoiding government aid or bankruptcy or an increase in freight rates - that the present wage level will go down.

Now, what happens when the present wage level goes down? We have a depression, and then we have Sir. Edward Beatty saying we must have unification - a vicious circle.

Let us see, though: Mr. Walker says, in Volume 65, at page 13593:

"There is not an industrial enterprise in this country today which is not infinitely more prosperous than it was in 1939. You cannot pick up a newspaper without seeing that this or that concern has increased its dividends and has had the best year in its history."

Is that inflation? Is prosperity inflation? At page 13569, a few pages before, I asked Mr. Walker if he agreed with Colonel Wilgus; I said:

"Col. William J. Wilgus (The Railway Inter-relations of the United States and Canada, 1937) states at page 282:

"Public ownership of railways, nationally consolidated, thus being deemed to be unescapable in the long run ..."

I suppose you do not agree with Mr. Wilgus?

A. I think that is an argument of defeat."

My lord, if there ever was an argument of defeat, it is the argument of the President of the Canadian Pacific Railway, that we have prosperity now but that prosperity is inflation and we must get rid of them both together.

I make this statement without fear of successful contradiction, that if a country is not normally prosperous it is not prosperous at all; and if the country is normally prosperous and the C.P.R. is yet on the brink of bankruptcy, the system does not work.

Now let me pass to the next matter. I am sure we all agree with Dr. Angus, in Volume 117, page 21202, where Dr. Angus is asking a question of Mr. Fairweather:

"If we take the evidence that has been presented to the Commission as a hundred per cent serious and as complete, a complete story, to which we do not have to add a few grains of salt, we get this sort of picture: In a large and increasing sector of the economy there is not a monopoly of transportation, because of water competition or truck competition. On the other hand, in some areas there is only one railway, so that you have a railway monopoly in any case. The benefits of the competition between the two railways seem to be rather nebulous things; we have had very great difficulty in getting any precise information as to the benefit conferred on consumers or shippers by competition between the Canadian National and the Canadian Pacific Railways."

It is true that Mr. Fairweather demurs a little at page 21204, when he says:

"A. Well, sir, I think that you are under-estimating the competitive angle."

But, bearing in mind that Dr. Angus had said to Mr. Fairweather, "if we are a hundred per cent serious in this matter," let us just see how serious Mr. Fairweather is when he says, "I think you are under-estimating the competitive angle."

I turn to Volume 111, at pages 20356, where Mr. Fairweather is being cross examined by Mr. Evans:

"Q. I thought what you indicated in your previous evidence was that you foresaw in the future and in the immediate present, increased highway competition?

A. Yes."

That was to Mr. Evans.

And at Volume 117, page 21249 - I just want to see how serious Mr. Fairweather was - the question was put by Mr. Covert:

"Q. What I wanted to find out was whether or not you thought it was feasible under those circumstances that these matters should be brought before the Board of Transport Commissioners..."

That is, these matters of economy.

"A. Well, I really do not know. I would hope that the railway will accomplish many economies, or as much economy as is reasonable, all things considered, under the provisions of the Canadian National-Canadian Pacific Act. Now, if they do not, well, I think that certainly the situation might be examined into. Whether it should be examined into as part of a rate case, I cannot quite see why it should, in a particular rate case. I see it as part of the broad problem of dealing with the railways of the country. It is one of the managerial problems, and as such it should receive attention. It is by no means the biggest. The biggest thing that there is in the country is this highway competition that I have been mentioning."

Now, what is the use of Mr. Fairweather saying to Dr. Angus that he thinks that Dr. Angus is under-estimating the competitive angle between the two railways, when Mr. Fairweather himself says that the biggest thing there is in this country is the competition^{of} highways and railways, and we know that from hearing the evidence? Therefore we can

agree with Dr. Angus' statement that the benefits of competition are nebulous things, rather nebulous, and on the record as we find it before the Commission we have no fear of political interference or Government control in connection with the operation of the Canadian National Railways or any Government Railways in Canada.

It is true that a cloud of political controversy arose some years ago in connection with the late Sir Henry Thornton, but a student of the situation will readily see many other factors in that situation. And on the record, as I say, Mr. Donald Gordon, who should know, says there is absolutely no government interference, no political interference, in the operation of the railway. Mr. Fairweather says, "No." At Volume 111, page 20345:

"Q. Would the Canadian National not be in perhaps a little more exposed position with regard to demands for rate reductions or demands for increases in wages, and consequently would that not press on the C.P.R. a little bit more than ordinarily would be the case?

A. That is a very interesting question. It is a matter on which I do not mind saying that in my early association with a government-owned enterprise I had substantial fear. Experience gained over some thirty odd years, a little more than thirty years, has taught me that if we can continue in the future the same sort of managerial skills and the same type of direction that we have had in the past, that those fears are groundless. The privately owned property and the publicly owned property have met on those matters and have seen eye to eye, and have dealt with them fairly and squarely, and I have not seen any discernible trend whereby the Canadian National management was softer than your private management in this regard.

Q. Do you think the attitude of the provinces or the attitude of labour is softer?

A. Well, the attitude of labour is naturally to get what it can, and I do not blame them. I can quite understand that the attitude of the public who pay the freight rates is that they desire to get them as low as they can. It is always a stress between opposing forces. All I can say is that in my experience the management of the publicly owned railway has not been deficient in that regard."

And on another occasion - I find I have mislead^{ed} the citation - I notice Mr. Fairweather said that the Canadian National made "no attempt to sweeten our appearance before Parliament."

Now, that is the record, and the Chairman's question of yesterday points up the argument in that respect. At Volume 126, yesterday's transcript, at page 22753, when your lordship was asking Mr. Barry what his opinion was with relation to appeals to the Privy Council of Canada, appeals to the Government of Canada:

"THE CHAIRMAN: I mean, you are appealing to one of the railways asking to have its own rates reduced, are you not?

MR. BARRY: Well, sir, that would mean normally that they would be prejudiced against us, owning one of the railways, but we are still satisfied to appeal to them."

THE CHAIRMAN: Would you repeat my question?

MR. CAMPBELL: Perhaps I had better go back one question before:

"THE CHAIRMAN: Did it ever occur to you as an objection to the present appeal that those who appealed were the owners of one of the railways? The Government

Mr. Campbell

of Canada owns the C.N.R., doesn't it?

MR. BARRY: That is right, sir.

THE CHAIRMAN: And then you appeal to the Government of Canada against the--

MR. BARRY: Well, objectionable from whose standpoint, sir?

THE CHAIRMAN: I mean, you are appealing to one of the railways"---

THE CHAIRMAN: To the owner of one of the railways, I think it should be.

MR. CAMPBELL: "...to the owner of one of the railways asking to have its ^{own} rates reduced, are you not?

MR. BARRY: Well, sir, that would mean normally that they would be prejudiced against us, owning one of the railways, but we are still satisfied to appeal to them.

THE CHAIRMAN: I see. Have you ever considered that? It may seem a little anomalous to have an appeal to the owner of a property against himself, his own interests. Well, I guess you have not."

THE CHAIRMAN: What is the volume and page of that?

MR. CAMPBELL: That is Volume 126, my lord, at page 22753.

Now, that little exchange in itself points out just what I have been saying about the Government control of a railway. The very fact of the existing of this Royal Commission points up how the Government exercised no control over the railway qua railway. It sits on appeals, it hears evidence, it appoints Royal Commissions at the instance of provinces against what you might call its own railway. So on the record, my lord, there is no Government control or fear; there is no bogey of political interference.

Then, your lordship, while we are speaking about yesterday's record, at page 22750:

"THE CHAIRMAN: Now you are talking about the C.P.R. also. What is your attitude toward the C.P.R.? That is should continue as a private enterprise?

MR. BARRY: I have no instructions otherwise, your lordship.

THE CHAIRMAN: That is as far as you can go?

MR. BARRY: That is right, sir."

This is a serious matter, my lord, and I might make the pious wish - that is all I can do, make the pious wish - that your lordship might put that question to counsel for the C.N.R. when they argue the case.

Now, having dispelled the bogey of political interference, having exploded the competition theory, let us see if we can for a few moments just where the fallacy exists, in the argument of the Province of Prince Edward Island.

People sometimes say during the course of this Commission's sittings, "What are you going to argue? I see you have got that amalgamation thing in there, you have got nationalization of the railways. What are you going to talk about?" "Oh, I suppose I will have to talk about nationalization." "Oh, that!".

Now, just let us see: because people assume there must be a fallacy in it, otherwise we might have had it before now. I dislike being Disraelian, and I am not a prophet any more ^{than} Disraeli was when he said they would hear him someday.

(Page 22882 follows)

THE CHAIRMAN: When he said what?

MR CAMPBELL: He told the House that they would listen to him some day. But I do think that some day, in all seriousness, nationalization is coming. I do not know if this Commission will think it should come now, but let us see---

THE CHAIRMAN: They may give you a peerage; that is what they did to Disraeli.

MR CAMPBELL: Let us see if we can -- I would like to find it -- where the fallacy is in this argument.

The transportation costs of Canada are paid by the people of Canada. I think that is a fair assertion. There may be some costs paid otherwise, but as a whole the transportation costs are paid by the people of Canada. The bills must be paid, whether the rates are high, whether they are low, whether they are paid by the shipper or by the consignee or by the producer or by the consumer; the transportation costs of Canada must be paid by the Canadian people. From which pocket they are paid does not enter into that statement.

Now, there have been arguments about the cost of service principle, the rate base and rate of return, and so on, but apart from all that, on any given commodity the freight rate is what the traffic will bear -- what the traffic will bear, I mean, in its proper sense, used in its proper sense, is what the freight rate is. That is what has to be paid by the people of Canada. As my colleague Mr. Darby showed this morning, the level of what the traffic will bear has been reached in the case of Prince Edward Island. I think the record more or less indicates that for practical purposes what the traffic will bear has pretty nearly been reached all over Canada. Mr. Fairweather says this is the biggest thing in this country -- they are up against highway

competition, they are up against truck competition, it is the biggest thing, it has got him worried to death. They are getting as much as they can get. The railways do not have the answer; they are trying the best they can. Freight rate levels in Canada now, or with one more increase -- to what odds? Ten per cent, five per cent, twenty per cent -- strike impending -- new wage demands, new freight rate levels, other wage demands, other freight rate levels -- I submit that it is not trite to say that we have arrived at the stage, from the standpoint of the people of Canada as producers or consumers, as shippers or consignees, where what the traffic will bear has been achieved, and not only from the standpoint of the people who pay the bills, but that stage has been reached for the railways.

Mr. Fairweather, in volume 117, at page 21259, being questioned by Dr. Innis:

"COMMISSIONER INNIS: I would like to ask a few questions before Mr. MacPherson. This does not refer particularly to what you have been saying about C.N.-C.P. co-operation, but I think you made a suggestion at one point (in fact Dr. Angus referred to it) that there was a danger of the railways pressing themselves out of the market by higher rates?

A. Yes.

Q. How quickly could you determine whether that was happening?

A. I think it would be very difficult to determine it with any degree of precision. The reason I could not answer, I did say that owing to the warping that has taken place in the rate structure, there are costs being transferred to marginal producers, that is, transportation costs, which they would not have to

bear when all that you were curing was the effect of inflation. You might infer that because his product went up, the value proportionate to the inflation, that therefore he could stand an increase in the rate. That would be true, but what is happening in this country and what is happening in the United States is something that is very much worse than that, that you have a situation where the tapered rate structure which was so essential to the development of this country is being warped, and it is because you have to meet the overall position and you cannot get your net revenues in the short haul and high valued field on account of highway competition; you necessarily have to load that on the marginal producer, and that is the deadly part of this situation. Now, it was because I knew that that process was going on that I felt there was danger of interfering with the productive economy of the country.

Q. You have no indicators which would tell you with any sensitiveness whether the rates were too high or whether they were too low?

A. No, no statistical indicators, sir; but I am, as I say, head of our development section and I therefore come in contact with new industry, and these new industries are almost invariably marginal producers at least initially" ---

I might say here, on the record, so is the primary producer is Prince Edward Island a marginal producer ---

"and I know the difficulty we are having in that regard. Freight rates as applied to these people are very very important, and when I see these freight rates loaded with the by-effect of this uneconomic situation,

highway vs. railway, I get very much concerned." And, as he said here, "You cannot get your net revenues in the short haul and high valued field," so you have to go to the long haul and marginal producer field.

THE CHAIRMAN: We will take a few minutes off now.

(Recess)

MR CAMPBELL: We had seen at page 21259 in volume 117 that Mr. Fairweather said that you necessarily have to load that on the marginal producer, and that is the deadly part of this situation, because you cannot get your net revenues in the short haul and high valued field. But we can get our revenues in the short haul and high valued field -- and that is the proper place to get them in any event -- by nationalization.

Now, we have remembered that the people of Canada must pay the transportation bill. Our "what the traffic will bear" level has been attained both with respect to shippers and consignees, producers and consumers, both with respect to the people of Canada and with respect to the railways of Canada. What the railways would like to be able to do but what they cannot do because of highway competition is to get their increased revenues in the short haul and high valued field, and the only way they can do that is by the nationalization of the C.P.R.

Let us see if we can find any fallacy in this. Income taxes today are twelve times the amount of customs revenues. It is true that fifteen years ago, as Dr. Innis pointed out in the Jones Report, when customs revenues were greater than income tax revenues, deficits on Government-owned railways having to be paid from revenue derived from the customs increased the burden on those very outlying

districts which suffer most already from the long haul freight increases. That is where they say now we have to get it if we are going to get it under the present set-up, we will have to get it on the long haul, we cannot get it on these short high valued hauls. It is true, as I say, as Dr. Innis points out, these people in Prince Edward Island, these people in Nova Scotia, these people in British Columbia, who pay customs duty, who buy clothing and buy shoes, who buy implements of production and buy things either on which there is a customs duty or which are built in Canada under customs protection, under the protection of the tariff, are in the position that an increase in freight rates to them, at least an increase in deficit on a Government road to them, is merely adding to their customs duties which they must pay on the goods which they use. That is not so today. Today, as I say, the income tax receipts of Canada are twelve times the customs duties, and by far the largest amount of income which the Dominion Government receives. For all practical purposes we might say that it is the item of revenue of the Government of Canada.

Now, suppose we nationalize the C.P.R., and suppose there is a deficit on the total of the two railways, and the Board of Transport Commissioners says, "The railways have to have an increase. We have had to avert this strike, we have had to raise wages, and we have to have a lot more money for the railways, but what the traffic will bear, owing to highway competition, has been reached, so we cannot raise freight rates, so we cannot give them any more money; they will just have to have a deficit." Now, who bears that deficit? The money has to be paid, we have seen, by the people of Canada. It is then paid by the people of Canada, by the people of Canada who are best able to pay it.

I wish to thank you, my lord and members of the Commission, for your kindness, and I wish to extend to you a very cordial invitation on behalf of the Province of Prince Edward Island to come and visit us again, either at your leisure or on business duties.

I might say just one word in closing. This matter of nationalization of the railways is a very serious matter, and your Commission perhaps should not overlook the fact, which of course you very well know, that your Commission will only recommend to the Government. If you gentlemen should come to the conclusion that nationalization of the railways of Canada is a solution to the problems that confront it transportationwise in Canada, then the burden of the final decision is not on this Commission, and the people of Canada may rest assured that they will be fully protected by both the Government of Canada and by Parliament, and possibly even by the people, before such a step should be finally and irrevocably taken.

THE CHAIRMAN: Thank you, Mr. Campbell.

Next, Mr. Covert?

MR COVERT: Mr. Carson.

THE CHAIRMAN: Very well, Mr. Carson.

ARGUMENT SUBMITTED BY
CANADIAN PACIFIC RAILWAY

Argument by Mr. Carson

MR CARSON: May it please the Commission:

Since your appointment on the 29th of December, 1948, this Commission has patiently sat through 126 days of evidence and argument, the record of which has now reached 22270 pages of transcript. You have heard evidence and representations from many witnesses and lawyers on a vast number of subjects, involving masses of detail and complexity, and reflecting wide differences of viewpoint. In these circumstances it may not be too much to mention that you have many times felt utterly befogged and overwhelmed. As you now approach the heavy responsibility of considering the report you are to make to the Governor in Council, it would not seem unreasonable to assume that you would welcome every effort on the part of any counsel addressing you to strip the case of its details and complexities, and to try to examine the essential problems in as clear a focus as possible.

For my part, in opening the argument on behalf of the Canadian Pacific, I shall strive to approach the matter from that viewpoint, and to that end I think it would clear the air, to some extent at least, if I were permitted at the outset of my argument to make some general observations.

I believe that the Commission has before it a typewritten memorandum of the notes of argument that I propose to present, and this part that I have described as general observations carries through to about page 16. May I say to the Commission that as I am going through this part of the argument it may occur to you that there are matters that arouse your interest, and may I assure you that they will be developed in detail by one or other of

my colleagues or myself as we proceed.

INTRODUCTION

1. In the first instance, I would like to bring to the attention of your Commission what brought about your appointment and what has given rise to the many alleged problems that have been discussed before you during the course of these hearings.

(What brought about the appointment of the Royal Commission)

2. In that connection may I briefly remind the Commission of the introductory paragraph of the Order in Council under which it was appointed. That paragraph reads as follows:

"The Committee of the Privy Council have had before them a report from the Rt. Hon. Louis St. Laurent, the Prime Minister, stating that it has been represented to the Government that, by reason of economic, geographic, and other disadvantages, certain sections of Canada are adversely affected by transportation difficulties and by certain anomalies which are said to be found in the existing tariffs of tolls and rates."

(Freight rate increases at the root of the alleged problems)

(Provincial opposition)

3. The representations to the Government referred to in the Order in Council and leading to the appointment of this Commission emanated from the seven Provincial Governments which, since October, 1946, have vigorously opposed the applications made by the railways of Canada for increases in freight rates. The appointment of the Commission resulted from the complaints of these seven Provincial Governments following the judgment of the Board of Transport Commissioners of March 30, 1948, authorizing a general increase in freight rates of 21%. These complaints, while covering a very

broad field and following the form of complaints which have been made off and on for the past thirty-five years, are basically and in reality directed to the payment of higher freight rates. Increases in freight rates constitute the very root that has grown to the wide-spreading foliage of many alleged problems put to your Commission.

4. Let me say a few words on that subject with a brief reference to what has happened over the last few years.

Fundamentally, railway companies are not immune to ordinary economic influences. If their wages rise and if their material costs increase, they have no escape from increasing their charges to meet their needs. If private enterprise railway companies cannot do so, they cannot survive.

(Page 22894 follows)

No one can be unaware of the enormous increase that has occurred in the wages of labour and the cost of materials in recent years. Commercial enterprises and primary producers have had no choice but to increase substantially the prices of their products. Even Provincial governments have felt the pinch of increased costs and have been compelled to pass on the effect of such increased costs to the citizens they serve in the way of increased taxation.

Railway companies are no different in that respect than anyone else. But since the railways of this country launched their first application for increased rates in October, 1946, they have encountered the most sustained and the most vigorous opposition from seven Provincial Governments that could possibly be imagined.

Substantial increases in freight rates following World War II were inevitable. The need for such increases should have caused no surprise to anyone. The seven Provincial governments, however, professed to be surprised. Their professed surprise and the extremity to which they carried their opposition are demonstrated by the position they took before the Governor in Council on September 27th 1948, in their appeal from the 21% increase. On that occasion they contended that the Canadian Pacific's financial position did not justify any increase in rates and that the 21% increase should be set aside.

May I read from their submission to the Governor in Council dated September 27th, 1948, at p. 47 as follows: and this is a summary at the end of their brief.

SUMMARY

We submit:

1. That had the Board applied the proper principles to the consideration of the financial need of the Canadian Pacific with respect to

- (a) the allocation of Fixed Charges and Dividends between Railway Earnings and Other Income;
- (b) surplus requirements;
- (c) maintenance charges including depreciation charges therein;

it would have found that the Canadian Pacific's financial position did not justify any increase in rates. This is shown by the Re-statement following the Board's formula to be found at page 13.

We accordingly ask for the following relief:

- (a) That the Order of the Board granting the 21% increase be vacated and set aside; or, in the alternative; "

and then they went on with certain alternative prayers.

5. The Governor in Council declined to set aside the increase of 21% but directed the Board to review certain complaints of the Provinces in accordance with the terms of Order in Council P.C. 4678. Pursuant to that Order in Council, the Board undertook a review of the earlier judgment concurrently with an application for a further increase of 20%. These proceedings required another lengthy hearing before the Board of Transport Commissioners in February, March and April, 1949, with no let-up in the Provincial opposition. When in September, 1949, the Board authorized an interim increase of 8%, the complaining Provinces opposed an application for leave to appeal to the Supreme Court of Canada on certain questions of law. Leave was granted and the appeal to the Supreme Court was then opposed by the same provinces.

6. It having been held by the Supreme Court that the Board had failed to perform its duty in certain respects in merely authorizing an interim increase, the application of the railways to obtain a final determination of their

application for a 20% increase launched back in July, 1948, was again opposed by the same provinces with renewed vigour before the Board when the railways in February of 1950 presented their case for final determination.

7. Judgment having been delivered by the Board on March 1, 1950, substituting an increase of 16% for the interim increase of 8%, the railways applied to the Board under date of 10th March, 1950, to reopen the application on the ground of certain errors alleged by the railways to have taken place in awarding only 16% instead of 20%. This application was heard before the Board on 17th April last and met with the same vigorous opposition from the same Provincial Governments.

8. Meantime and under date of 17th March, 1950, the same seven Provincial Governments launched an appeal to the Governor in Council from the order authorizing the 8% increase and from the order authorizing the substitution of a 16% increase.

(Complaints to this Commission are basically designed to produce lower basis of rates.)

9. I have taken time to refer briefly to the history of events over the last three years so as to remind the Commission of the vigorous and sustained opposition made by the seven Provincial Governments to the efforts by the railways to obtain increased rates to meet their increased costs of operation. I would respectfully suggest that almost without exception the complaints which your Commission has heard from the Counsel for the seven Provinces and from the witnesses they have produced are basically complaints designed to produce for those complaining a lower basis of rates. Almost all the remedies which your Commission has been asked to recommend have their foundation in the desire of many of the groups and interests appearing before

your Commission to transfer either to other parts of Canada or to the taxpayers at large, in whole or in part, the burden of increases of rates which have taken place or which are or will be in the process of adjudication.

(People and interests appearing before this Commission)

10. Throughout the long course of the proceedings before this Commission, you have no doubt been struck with the tendency on the part of those who have complaints to come forward, and the tendency on the part of those who have no complaints not to come forward. The result has been that there has been a very large body of people and interests who have not been heard on the other side of the question. Many of the problems discussed before your Commission have been of such complexity that it is not at all surprising that a great body of people in Canada have neither the time nor the money to study such problems and present any intelligent or helpful views.

It would be wrong, in my submission, to assume that those who have appeared before this Commission and have made such complaints are representative of a large majority of the shipping public or of the people of Canada. It has been argued here, as indeed it has on many occasions before the Board of Transport Commissioners, that the seven Provincial Governments whose Counsel have been in the forefront of all the rate proceedings in the last three years, truly represent the mass of individuals who pay the freight rates. It seems to me that there is a wide distinction between the representative capacity of Provincial Governments as disclosed by their strength at the polls, on the one hand, and the assertion that, having been chosen the elected representatives of their people, they can be said truly to represent the sentiments of the people on a matter so complex as freight rates.

One can scarcely believe that any thinking Canadian would question the need to have safe and adequate rail transportation in Canada or that he would question the need of the railways for a substantial rate increase in 1948. And yet, if the seven complaining Provinces had had their way before the Cabinet in September, 1948, the 21% increase would have been set aside and no increase allowed. In that event, and if the Canadian Pacific could obtain no increase in rates in a period of high traffic volume, its inability to obtain increased freight rates in times of depression and low traffic volume would ultimately lead to the bankruptcy of the Canadian Pacific.

The gravity of the problem resulting from railroad prosperity not being permitted to keep pace with general economic prosperity is clearly and concisely expressed in Dearing and Owen's book on National Transportation Policy, published in 1949.

THE CHAIRMAN: Is that in the United States?

MR. CARSON: Yes, my lord, that is published by the Brookings Institution.

At page 372, the authors made this statement:

"Delays inherent in the regulatory procedure have been damaging to the railroad financial position".

My learned friend Mr. Evans will deal with certain observations of the authors in support of that statement, but your Commission will find two paragraphs on page 373 that give emphasis to the gravity of the problem to which I have referred. Those two paragraphs read as follows:

"Because of these regulatory rigidities and the resulting lag between increasing costs and revenue, the carriers as a whole have not benefited substantially from the general post-war prosperity. In fact the current financial and operating position of the railroads

"stands in striking contrast to the prosperous conditions of other industries. The carriers are now operating at approximately their practical freight capacity; yet their operating ratios and net earnings are reminiscent of the period when general business stagnation and low traffic levels afforded ample explanation for unsatisfactory financial results.

This reversal of the historic relationship between railroad prosperity and the general level of business activity creates a grave problem of public policy, for if the carriers are not permitted to realize high earnings in the midst of general economic prosperity, their prospects for continued solvency are poor. The record indicates clearly that without high earnings at the peak of the business cycle, to compensate for inevitable losses during depression, it will be impossible to maintain and improve the railroad plant at the rate necessary to meet intensive competition and to assure the standby capacity necessary for national security."

Later, I will refer to one solution of such a problem as proposed by Dearing and Owen.

(Need for capital and for restoration of credit.)

11. The failure of the rail carriers in Canada to obtain an adequate rate level in the present era of national prosperity and the delay in obtaining the limited rate relief so far granted, have posed an anxious problem for the Canadian Pacific.

In that connection I remind the Commission of the Canadian Pacific Submission, Part I, from pages 8 to 18, and of the evidence supplementing it given by Mr. Crump and Mr. Newman as to the anticipated requirements of the Company in the five-year period 1950-1954. It has been made clear

to your Commission that the Canadian Pacific is faced with the need of obtaining substantial amounts of new capital.

In the experienced judgment of the Canadian Pacific officers, new and improved facilities are required in order that it

may furnish efficient service and provide economical operation and as well in order that it may keep pace with the growth and development of the country. A considerable amount of the required capital must be obtained by the issue of ordinary capital stock, but this cannot be done until the credit position of the company is restored. To have its credit reinstated in the money markets of the world, a level of rates must be assured to the company that will provide a fair measure of net earnings each year.

If the credit of the Canadian Pacific cannot be restored during this peak of the business cycle, what hope can there be that it will be restored when the business cycle sinks to adverse depths.

This Commission will readily appreciate how the Company's plans to keep abreast of the needs of Canada for adequate, efficient and economical transportation service have been seriously thwarted by the inability of the company to obtain adequate and speedy relief in the way of increased rates.

With all respect to the seven Provincial Governments, their unrelenting opposition to the rate applications of the railways constitutes, in my submission, a short-sighted policy. Such opposition and its success up to the present time have given the people of Canada nothing but a sedative, the effect of which can only be of relatively short duration. That sedative is not a cure. When its effect wears off, it is not beyond the realm of possibility that the people of Canada may ultimately find themselves suffering the painful ailment of insolvent railway companies. If and when that occurs, the people of Canada will have no choice but to pay dearly (and in less prosperous times when they can

ill afford to pay dearly) for rail transportation service that falls short of the standard of adequacy, efficiency and economy to which they are entitled.

The excessive time lag in Canada between the railways' need for rate relief and the granting of relief -- and on top of that, the inadequacy of the relief when granted -- is detrimental to the interests of the people of Canada as well as to the railways. Later on I shall examine in greater detail the actual time lags that have occurred and some of the causes of these lengthy time lags.

Meantime, I would like to make this general observation. Speedy relief, in keeping with the needs of the railway, would cause a little, if any, shock to the economy of the country, as compared with the shock to the economy that results from long-delayed and inadequate relief, which has been the rule in recent years.

Speedy and adequate relief has been denied to the railways as a result of two principal causes:

- (1) the vigorous and sustained opposition emanating from the seven Provincial Governments, and
- (2) the lack of a definite formula or principle upon which applications can be based and relief granted.

Speedy and adequate relief would require more frequent applications, but the rate of increase granted on each application would be less. Comparatively smaller horizontal increases granted more frequently from time to time would not come with the shock to industry or to the price-paying consumers as would a comparatively higher rate of increase after a long period of time in which no increase in freight rates had occurred.

During such long periods, industries develop their markets on the basis of transportation costs that seem static and which they grow to treat as something in the nature of

vested rights. Consumers are likewise lulled into the habit of obtaining goods in some instances from sources not hitherto available and of paying prices that make no allowance for increased freight rates as an item of cost. The result is that when after a long period of time a rate increase occurs which seems relatively high, industry and consumers who have become unaccustomed to the costs of transportation keeping pace with other costs put forward strenuous complaints as to their ability to bear such increased costs of transportation. This, in my submission, could be avoided to a considerable extent if there was a certainty of formula and principle that would permit increases in freight rates to be granted promptly in keeping with railway needs. One of the main causes of the chaotic condition in which we now find ourselves with respect to the uncertainty of formula and obtaining prompt and adequate relief is the power of political intervention which now exists by virtue of the right of appeal to the Cabinet under Section 52(1) of the Railway Act. Later in my argument I will develop in detail the evils which, in my submission, flow from this provision of political intervention.

So much for the general observations I desired to make at the outset of my argument.

THE CHAIRMAN: We will adjourn now.

(The Commission adjourned at 4.45 P.M.
to meet again on Wednesday, May 17th,
1950, at 10.30 A.M.)

A.R.

Canada
ROYAL COMMISSION
ON
TRANSPORTATION

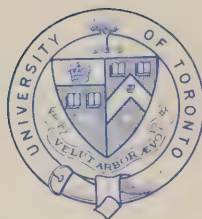
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ROYAL COMMISSION ON TRANSPORTATION

Ottawa, Ontario,
Wednesday, May 17, 1950
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ROYAL COMMISSION ON TRANSPORTATION

Ottawa, Ontario,
Wednesday,
May 17th, 1950.

THE HONOURABLE W.F.A.TURGEON, K.C. LL.D. - CHAIRMAN
HAROLD ADAMS INNIS - COMMISSIONER
HENRY FORBES ANGUS - COMMISSIONER

- - - - -
G. R. Hunter
Secretary
- - - - -

COUNSEL APPEARING:

F. M. Covert, K.C.	}	Royal Commission on Transportation.
G. C. Desmarais, K.C.		
C.F.H.Carson, K.C.	}	Canadian Pacific Railway
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K.D.M.Spence,		
I.D.Sinclair		
H. E. O'Donnell, K.C.	}	Canadian National Railways.
N.J.MacMillan		
H.C.Friel, K.C.		
J. J. Frawley, K.C.)	Province of Alberta
M. A. MacPherson, K.C.)	Province of Saskatchewan

- - - - -

Ottawa, Ontario,

Wednesday, May 17, 1950

MORNING SESSION

ARGUMENT BY MR. CARSON (Cont'd)

THE CHAIRMAN: Very well, Mr. Carson.

MR. CARSON: Thank you.

COMMISSIONER INNIS: Are you prepared to describe this earlier section, Mr. Carson, as a sort of immediate consequence of Mr. Donald Gordon and the Wartime Prices and Trade Board?

MR. CARSON: I don't know. I had not thought of it in that way.

COMMISSIONER INNIS: You do put the responsibility there for fixed rates throughout the war?

MR. CARSON: I don't know that I quite appreciate in what sense you are putting that to me.

COMMISSIONER INNIS: The impression one gets is that the applications for marked increases in rates were the result of the fact that rates were fixed all during the war period by the Wartime Prices and Trade Board.

MR. CARSON: Yes, and in that sense there was a similarity about other prices, of course, but then certain prices were freed from control, and at a certain stage in the 21% case railway rates were removed from control.

COMMISSIONER INNIS: During the war period you had no way of escape?

MR. CARSON: Oh, no. Of course it was after the war that these delays occurred.

PART IITHE TRANSPORTATION PROBLEM IN CANADA

1. I shall now turn to the second introductory paragraph of the Order in Council appointing your Commission in order that I may put to the Commission the Canadian Pacific view as to the nature of the essential problem with which you are concerned.

That paragraph reads as follows:

"The Committee, having taken cognizance of the aforesaid representations, has come to the conclusion that it would be in the public interest that an inquiry be made into the matters involved in order that all questions of economic policy within the jurisdiction of Parliament arising out of the operation and maintenance of national transportation, may be examined and reported upon."

2. The Order in Council then proceeds without restricting the generality of the above paragraph to request the Commission to review and report upon certain specific subjects. Without at the moment getting into the details of the specific subjects referred to, I would invite the attention of the Commission to the first three paragraphs of the Canadian Pacific's Outline Submission appearing on page 1 of Part I.

I should like to read, if I may, commencing about the fifth line of paragraph No. 1.

"The essential problem can, in our view, be simply stated, that is to say, how the people of Canada can be furnished adequate and modern transportation services at the lowest possible

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cost to the nation and without unnecessary or uneconomic consumption of labour and materials.

2. No transportation service can be said to be adequate unless it is so arranged and its rate structure so framed that the traffic of the country is moved freely and the agricultural and industrial development of the country maintained and encouraged. The problem is definitely not one as to which part of the country should obtain special treatment as compared with another part nor is it one of the extent to which the railways can be made the medium by which artificial and uneconomic development of certain parts of the country can be achieved at the expense of other parts. Transportation is of national and not merely sectional importance.

3. The problem involves, in our view, the need of ensuring that the railways of this country be made financially sound and be able to provide adequate and modern railway services. Railways, at least those privately owned, must be able to attract the necessary capital to their enterprises in order that they may keep pace with the need for expansion and modernization of their services and for the improvements which are required to ensure that the products of industry may find their markets both at home and abroad."

3. The problem, as there stated, is in my submission essentially simple. It can perhaps be even more simply condensed by stating it to be a problem as to how the public of this country can be furnished with

safe and adequate transportation service at reasonable rates.

Now, my lord, still continuing with the general principles that underlie the basis of our argument, I turn to page 12 of the written memorandum, and I say something of a general nature with respect to regulation. Again this is a subject that will be developed in a specific way as our argument proceeds.

PART III

BASIC PHILOSOPHY

(a) Regulation

1. In considering the problem as I have described it, the basic philosophy underlying the regulation of public service corporations should be, I submit, kept in mind. Part I of the Canadian Pacific submission contains a section commencing at page 142 and extending to page 151 that gives what I submit is a sound outline of the basic philosophy underlying such regulation and contains a proposal which would go a long way to the solution of the problem under consideration by your Commission.

If the Commission will turn to page 142 of Part I, I think I can avoid reading all that I suggest in my memorandum should be read. At page 142 you will find something in the nature of a history commencing with the common law principle. That is referred to in the first double space paragraph on that page reading:

"At common law those engaged in a 'common calling' were required to serve all who applied at reasonable rates (e.g., innkeepers, armorers, candle mongers)."

Then reference is made to the introduction of railways as common carriers in England, and the introduction of the concept of control. On page 143 we turn to the development in the United States of control, and at about the middle of the page we point out that:

"So long as a traveller or a shipper had a choice between using his own vehicle or that of a common carrier, whether the movement was by road or through coastal or inland waterways, there was no need for Government interference with the functions of management of a common carrier."

Then the history is continued further, and at the top of page 144 reference is made to the development in the United States and Canada in the case of railways, and their indispensability. Then, towards the bottom of page 144 there is one paragraph I propose to read.

"Since the first Canadian Railway Act, regulation of Canadian railways has not basically altered, although the trend until about twenty-five years ago, was one of expanding government control. Since 1925 there have been no major extensions of Government regulation of railways in Canada; nor, however, has there been any major diminution of the amount of control exercised.

"The transportation scene has materially altered in the last twenty-five years."

(Page 22908 follows)

and the other is the same as the one in the first case.

1. 1990

Then we develop what is well known to the Commission, and that is that the railways no longer have a monopoly, and that monopoly is becoming less and less with the competition of other forms of transportation. In the middle of page 145 we say:

" Railways still have a virtual monopoly in Canada for long-haul movement of many bulky, relatively low value commodities. Railways still are the most efficient transport media for the mass movement of persons and goods over long distances, especially where there is light traffic density. Railways recognize, therefore, that some regulation of their enterprise is to be expected and deemed in the public interest. Such regulation must always, it is submitted, stand the test of whether it is necessary in the public interest. If any regulation cannot stand such test, its retention can only be supported on the principle of using railways as an instrument of socialistic policy.

Even where regulation can stand the test of necessity for protection of the public, such regulation must be definite. Disputes must be settled solely on their merits and decisions must be rendered without undue delay. This fact has been universally recognized and was the principal reason why the body regulating railways in Canada was changed in 1903. "

The development of transportation facilities is concisely described in Dearing and Owen's book on National Transportation Policy published in 1949 in the following passage appearing at page 2:

" The development of our transportation plant

has continued to the point where effective and almost universal competition has supplanted monopoly. Passengers may travel on the highway by bus or by automobile, and in most communities of any size they are offered the additional choice of rail or air service. Similarly, the movement of freight is possible on the highway in private, contract, or common carrier truck, as well as by rail or water; and more recently, air cargo has introduced a new and rapidly expanding service. For special purposes, the pipeline network offers cheap and efficient transport. In international commerce there is now the choice of ship or plane."

Since the fundamental purpose underlying the regulation of public utilities is to protect the public from the monopolistic position of public carriers, the extensive development of competing forms of transport over the last two or three decades lessens the need for close and rigid regulation. In my submission it would be contrary to sound economic policy to impose further regulations upon railways. Indeed, because of the increasing strength of competition; the trend as our Brief points out at p. 142, should be towards less rather than more regulation of railways.

The brief presented by Mr. Moffat on behalf of Manitoba and the final argument before your Commission by counsel on behalf of that Province contained proposals for new and greater restrictions on the initiative of management which, if given effect to, would, in my submission, have no other result than to cause serious deterioration in the efficiency of transportation service now rendered by the Canadian Pacific and would ultimately lead to its

destruction as a private enterprise. These proposals - that is, the proposals of Manitoba - will be dealt with in the argument of Mr. Evans.

There is one particular aspect in which Dearing and Owen suggest a lessening of the rigidity of regulation in the interest of preserving a financially stable, efficient and progressive railroad system.

The Commission will recall that I quoted two paragraphs from Dearing and Owen at p. 373 in which they draw attention to the grave problem of public policy resulting from railroad prosperity not being permitted to keep pace with general economic prosperity. I said at the time that later I would refer to one solution of that problem as proposed by those authors. Since it is appropriate to the question of greater or less regulation of management, I shall now read a further passage from that work commencing at the bottom of p. 373:

It seems clear, then, that in the interest of preserving a financially stable, efficient and progressive railroad system, some way must be found to remove unnecessary obstacles to prompt adjustment between carrier operating costs and the level of rates paid for the service.

A larger measure of discretion over general pricing policy should be restored to railroad management. If railroad management is to retain any of the essential functions of business control, it must be permitted to exercise its own judgment as to how far rates can be raised without driving traffic away. It must also be permitted to judge what particular type of pricing policy and rate structure is best adapted to a strengthening of the railroad competitive position. This proposal does not contemplate any change in the Commission's present authority over minimum

rate regulation, nor any dilution of the prohibitions against discrimination. The sole purpose is to remove from the Commission's extensive duties any obligation to protect the carriers against the consequences of alleged bad business judgment, or to share with the carriers the onus of raising transportation rates. Under a competitive organization of the transportation system, it is no longer necessary for public authority to assume the burden of such control. For experience indicates that regulatory agencies are inherently ill-adapted to the exercise of managerial functions and cannot be held directly responsible for decisions that prove financially injurious to the regulated industry. The restoration of a better balance between government and private enterprise in the matter of general rate levels could be effected by two simple amendments to the rule of rate making contained in the Interstate Commerce Act. First, in disposing of general rate cases, the commission should be relieved of any authority or responsibility for considering the

"effect of the rates on the movement of traffic."

THE CHAIRMAN: Will you please read that last sentence again?

MR. CARSON: Yes.

"First, in disposing of general rate cases, the Commission should be relieved of any authority or responsibility for considering the "effect of the rates on the movement of traffic."

I am going to refer to that in a moment so far as Canada is concerned.

"Second, the amended rules should make it mandatory for the Commission to grant advances on the simple showing by the carriers that substantial increases in operating costs have been incurred.

Subsequent hearing should then deal with the intricate question of rate relationships and any questions that might arise with respect to excessive earnings by individual carriers. These amendments would leave the Commission with ample authority to protect the public against the exercise of any vestige of monopoly power on the part of the railroads, and with adequate power to control the standards of competition by minimum rate regulation. The proposed amendments would thus produce only one major change. There would no longer be any occasion for the Commission to take prolonged testimony on general economic trends, inflationary forces and the ability of particular industries to bear additional transportation costs. Final responsibility for gauging the effective demand for various classes of railroad service would thus be placed with private management."

It is true that in Canada our Railway Act does not require the Board in disposing of general rate cases to consider the "effect of the rates on the movement of traffic". In that respect we are free of one of the objectionable regulatory obstacles to which Dearing and Owen refer.

The second amendment to the Interstate Commerce Act they propose is to make it mandatory for the Commission to grant advances on the simple showing by the carriers that substantial increases in operating costs have been incurred, leaving the intricate question of rate relationships for subsequent hearings. We likewise have no such provision in our statute. But, in my submission, an amendment of our Act that would go a long way towards meeting the desired objective would be the repeal of Section 52(1) which permits political interference with the decisions of the Board. The freedom of action that would be assured to the Board by the repeal of that provision would give them an incentive to approach general rate cases with courage and impartiality for the good of all concerned. But I shall have a good deal more to say on that subject later.

I am still laying down the general pattern, if I may, of what ^{to} is/comes. Keeping in mind the essential problem confronting your Commission, it can scarcely be questioned as a matter of basic philosophy that the interest of the shippers lies in the maintenance of safe and adequate service at reasonable rates. In that respect there is little divergence of interest between the shippers and the railways. That the Canadian Pacific is fully alive to the common interest of itself and its shippers is well demonstrated by the concluding observation made by Mr. Crump in his reference to the need for new and improved facilities in the 20% Case, where he said at page 1298, Vol. 809:-

"In conclusion, may I remind the Board that the operations of the Railway and its maintenance are my responsibility and my concern. Those operations and that maintenance are equally the concern of the shippers of Canada. I consider it is in their interests that the improvements in service to which I have referred should be carried out as expeditiously as possible. In the final analysis the ability of our Company to give its shippers the service they require depends upon the rates that the shippers themselves pay for that service."

(b) CANADIAN PACIFIC AS PRIVATE ENTERPRISE.

3. As pointed out in our Outline Submission in paragraph 4 on page 1 of Part I, the Canadian Pacific submissions are based on the assumption that "it is in the best interest of Canada that Canadian Pacific is to continue to function as a privately-owned system".

4. The reasons for that basic assumption were put to your Commission concisely and with clarity by Mr. George A. Walker, Chairman of the Company, in his

statement commencing at page 13362 of the Transcript, Vol. 64. The responsible executive position now held by Mr. Walker after a lifetime of experience in railway affairs gives him unparalleled qualification to speak to your Commission on that subject and his words will, I am sure, command your deep respect. For that reason, and also because over five months have elapsed since that important statement was presented to your Commission, I would respectfully ask the Commission to re-read Mr. Walker's statement dealing with this basic assumption commencing at page 13362 and continuing to page 13369, of Vol. 64.

5. Coming back again to the question of economic policy with respect to National transportation, with which your Commission is concerned, my submission is that that policy should be directed to assure to the people of Canada safe and adequate transportation service at reasonable rates.

6. I now put to the Commission three fundamental propositions that, in my submission, are essential to the achievement of that policy:-

- (1) The Board of Transport Commissioners should be endowed with the broadest possible powers;
- (2) Persons appointed to the Board of Transport Commissioners should have the highest possible qualifications so as to ensure a completely judicial, impartial and competent performance by the Board of its functions under the Act.
- (3) The administration of the Act and the functions of the Board should be

completely removed from the possibility of political intervention.

My colleagues with whom I have the honour to be associated: on behalf of the Canadian Pacific will deal with the first proposition.

As to the second proposition, one would scarcely expect it to be challenged, but it will, I think, be given any support it needs as I develop the argument on the third proposition.

PART IV

APPEAL UNDER SECTION 52(1)

1. Now, if it pleases the Commission, I shall deal in particular with the third proposition, namely, that the administration of the Act and the functions of the Board should be completely removed from the possibility of political intervention.

2. This can only be achieved, in my submission, by the repeal of Section 52(1) of the Railway Act to which I shall now refer, and by an amendment of sub-section (2) of Section 52, to which I shall later refer.

Section 52(1) reads as follows):-

"The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Board, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order which the Governor in Council may make with respect thereto shall

be binding upon the Board and upon all parties."

It will be observed that under this Section the Governor in Council has the broadest possible powers to vary or rescind a decision of the Board. This power can be exercised whether the decision involves a question of law or a question of fact, or questions that are of mixed law and fact. The power may be exercised regardless of whether any question of principle or precedent is involved. Despite the evidence upon which the decision of the Board was based, it may be exercised regardless of such evidence. Political expediency may well be the cause of the exercise of the power. I am not suggesting that the Governor in Council would readily vary or rescind a decision of the Board regardless of evidence or principle. Nevertheless, the power is there. Those who are aggrieved by a decision of the Board know that the power is there. But the real evil is that the Board of Transport Commissioners know that the power is there. That power is hanging over their deliberations and their decisions at all times. It is inevitable that their deliberations and decisions on matters of great importance should be unconsciously affected by the knowledge that any decision they may render may be set aside or varied if it is of a character that will inspire heavy political pressure. The natural, though quite unconscious tendency of the Board in cases that arouse wide-spread public interest would undoubtedly be to lean to a result that would minimize so far as possible the political pressure upon the tribunal (that is, the Cabinet) endowed with unrestricted power to reverse the Board. The members of the Board are not superhuman and it is idle to believe that they can be unaware of political pressure, fanned to a white heat as it so often is, by widely circulated press reports and by interviews given and

pronouncements made by occupants of political office in the seven complaining Provinces.

Such a condition, in my submission, constitutes a serious threat to the survival of the Canadian Pacific as a private enterprise. One can well imagine that the political pressure asserted during the course of a rate application might become so strong and so well-known that the Board of Transport Commissioners would unconsciously tend to reach a decision that would lessen the political pressure to a degree that the Governor in Council would not feel compelled to vary or set aside the decision. In such an event, the Canadian Pacific would not obtain the relief to which it was entitled and which the Board, if uninhibited by the possibility of political intervention, would have undoubtedly granted.

The existence of Section 52(1) presents, in my submission, two simple alternatives --

(1) Its repeal would remove the decisions of the Board from the possibility of political interference. The Board, feeling its new independence, would gain courage, strength and impartiality, and soundness and dependability of judgment would soon develop;

(2) The second alternative is its continuation. Its continuation would only serve to perpetuate the weakness and uncertainty of administration that must now unconsciously beset the Board. There would be no relief from the stimulation of political pressure for results that may have popular public appeal with certain sections of the country, regardless of the serious injury that may in the ultimate result be caused to the economy of the country as a whole.

3. I will later point to some of the evils that in my submission have resulted from the existence of Section 52(1).

4. But at this stage, I would like to read from Part I of the Canadian Pacific Submission commencing at p. 146, which gives a brief outline of the history of railroad regulation in Canada.

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I commence on page 146 at the top:

"Prior to 1903, railways in Canada were regulated by the Railway Committee of the Privy Council. This body was first constituted by the Railway Act of Canada 1868 (Sections 23-47). The Railway Committee of the Privy Council was composed of elected representatives of the Canadian people. Its members were charged with all the responsibilities of Ministers of the Crown, as well as their duties regarding regulation of Canadian railways. The Committee had not the time, nor the opportunity, nor the facilities for taking up questions respecting the control and regulation of traffic upon railways and the rates and tolls to be charged by them. This work could be more efficiently performed by a tribunal specially constituted for that purpose."

And in support of that, reference is made to a statement made by the Hon. Mr. A. G. Blair, then Minister of Railways, and I shall say something more about that in a moment.

"The abolition of the Railway Committee of the Privy Council and the substitution of the Board of Railway Commissioners resulted from an investigation and report by Professor S. J. McLean (Sessional Papers 1902, No. 20(a))."

And in a moment we come to some quotations that I made from that report.

"Professor McLean at p. 37 found:-

"The defects in the Railway Committee as a regulator of railway transportation I would place under the following headings:-

(1) It has a dual function - political and administrative;

(2) The lack of migratory organization renders it

- impossible to deal effectively with complaints;
- (3) The distance to be travelled by the complainants renders the expense too great;
 - (4) There is a lack of technical training for the work;
 - (5) The existing organization is not sufficiently permanent."

I pause there to go to page 20 of the written argument, to make some further reference to this report:

Note A

The Report from which the extract that I have just read from page 146 given in our Brief was dated February 10, 1899, and I would like to read some additional passages to the short passage quoted in our brief. The problem of setting up a Railway Commission to replace the Railway Committee of the Privy Council was the subject of considerable discussion in Canada at that time. Professor McLean submitted another report dated January 17, 1902, which will be found in the same Sessional Papers commencing at p. 41.

On p. 8 of the 1899 Report he says, (referring to the history of railway regulation in England):

"The Regulation of Railways Act, 1873, provided for the appointment of a railway commission. The provisions of this Act are so important that the following summary of the provisions bearing directly on the question is given."

Then, on the question that was then before Canada:

"Provision was made for the appointment of three commissioners and not more than two assistant commissioners. The commissioners were to receive a salary of £3,000 per annum."

Now, my lord, that was a considerable salary in 1873 in

England.

"One of the commissioners was to be experienced in the railway business. The commissioners were not to be in any way interested in any railway or canal company, financially or otherwise. If they held investments in such companies at the time of their appointment they were to dispose of them within three months; and if during their tenure of office any such securities came to them by bequest or otherwise, they were to dispose of them within three months. The commissioners were to devote all their time to the duties of the office."

Then I refer to the changes that were made in the Commission in 1878: (p. 9)

"Changes in the Commission:- The Commission so appointed was in the nature of an experiment. It was appointed for five years. At the expiration of its term in 1878, it was continued from year to year. It was found that the Commission was not working as satisfactorily as had been anticipated, and so its working, as well as the rates charged by railways and canals, was investigated in 1882 by a special committee of the House of Commons.

This committee found after a careful investigation that the Commission had been hindered in its work by its temporary character."

THE CHAIRMAN: Pardon me; what was the temporary character?

MR CARSON: Well, your lordship will see that they were originally appointed for a term of only five years, and the Committee that looked into it felt that it seemed to have too much of a temporary character at that time.

"The Commission notwithstanding this had been of public advantage in that it not only caused justice to be done

more speedily in those cases which came before it, but also prevented differences from arising between railway companies and the public."

Then on page 21 of the notes reference is made to the supplementary legislation. Professor McLean said:

"Supplementary Legislation:- It was not until 1888 that the Railway Commission was put on a more permanent footing, in that year the 'Act for the better regulation of Railway and Canal Traffic and for other purposes' was passed (51 & 52 Vict., cap. 25).

The constitution of the Commission was rearranged. It was constituted as a court of record, it was to have an official seal which was to be judicially noticed. In future the Commission was to be composed of two appointed commissioners, who should each receive a salary of £3,000 per annum, and three ex-officio commissioners. The appointed commissioners were to be appointed by Her Majesty on the recommendation of the Board of Trade, and one of them was to be experienced in railway business. They might be removed by the Lord Chancellor for inability or misbehaviour. The provisions of the Act of 1873 requiring that commissioners should not be pecuniarily interested in railway enterprise, were made applicable to the appointed commissioners.

One ex-officio commissioner was to be designated from a superior court in England by the Lord Chancellor, one in Ireland by the Lord Chancellor of Ireland, and one in Scotland by the Lord President of the Court of Session. The term for which they were to be designated was five years."

THE CHAIRMAN: I see there that one ex-officio

commissioner was to be designated from a superior court in England* by the Lord Chancellor.

MR CARSON: Yes, and one in Ireland by the Lord Chancellor of Ireland, and one in Scotland by the Lord President of the Court of Session. In that way the three parts of the country were represented.

(p.10):

"There is no appeal on a question of fact or upon any question regarding the locus standi of a complainant. An appeal on a question of law lies to a Superior Court of Appeal. This appeal is to be treated as if it were an appeal from a judgment of a superior court. The Court of Appeal has power to make any order the commissioners could have made.

.

The commissioners have power to review, rescind or vary any decision passed by them."

(p. 35):

"The movement in Canada has proceeded part of the way towards a Commission. In other countries it has been shown that general regulative control over rates and other features of railway transportation has gradually passed to bodies smaller than the legislatures which at first were entrusted with such regulative power, and this with the consent of such bodies. The larger political organizations have been considered unfitted for dealing with such matters. Matters of railway regulation require the most careful consideration at the hands of those especially qualified to deal with the subject. This consideration is best obtained from a smaller body whose functions are not political. In Canada the declaration of a right of control over rates by Parliament still exists. But in view of the

fact that this can not be exercised until a dividend of 15 per cent is obtained, such declaration of power amounts to nothing. It is to a smaller organization that we must look for the regulative function.

As it is organized now it is in the hands of the Railway Committee,"---

THE CHAIRMAN: He says:

"In Canada the declaration of a right of control over rates by Parliament still exists."

MR CARSON: Yes. That was the provision that was then in the Railway Committee.

"But in view of the fact that this can not be exercised until a dividend of 15 per cent is obtained, such declaration of power amounts to nothing. It is to a smaller organization that we must look for the regulative function.

As it is organized now it is in the hands of the Railway Committee, and in some degree ultimately in the hands of the Cabinet. Canada has only gone part of the way, followed by England and the United States. It has committed the regulative function to a smaller body; but that body is political in its functions.

An initial objection to placing such power in the hands of the present organization is that it mingles essentially administrative functions with political functions. The transportation problem is the most important problem that Canada faces today."

And, in my submission, that is equally true on the 17th of May, 1950.

"The greatest care in its regulation, in the interests of the people, is essential. The political duties of the members of the Cabinet, the wide sweep of duties with which the Ministers are concerned, do not permit

Mr. Carson

of their devoting themselves to all the intricate questions connected with the matter of regulation. They are not able to devote all their time to the work; it is at the same time a problem which demands entire attention. Then again the shifting conditions of political life preclude that continuity which is essential if the results of experience and the advantage of fixed policy are to be obtained. A further consideration of the general problems facing Canada and of the way in which the Committee has met them will strengthen the argument."

p. 37:

"The defects in the Railway Committee as a regulator of railway transportation I would place under the following heads:-

- (1) It has a dual function - political and administrative.
- (2) The lack of migratory organization renders it impossible to deal effectively with complaints.
- (3) The distance to be travelled by the complainants renders the expense too great.
- (4) There is a lack of technical training for the work.
- (5) The existing organization is not sufficiently permanent. "

Then I ask your lordship and members of the Commission to note the opinion of Professor McLean:

"In my opinion, the only way to put the matter of railway regulation on a more satisfactory footing in Canada is by entrusting it to a railway commission composed of men of technical training, who shall receive salaries adequate to attract the most efficient, and who shall have a long tenure of office.

The transportation problem presents in every country especial features. I do not regard the policy adopted either in England or in the United States as applicable in its entirety to Canada.

The main points of the legislation I suggest I present here in summarized form; the detailed statement will be given in the draft legislation."

Then he goes on at the bottom of that page to suggest the recommendations that he proposes:

"There should be a commission composed of three members, one of whom should be a railway man, one a business man, and one a lawyer. They should have control over all matters of regulation now possessed by the Railway Committee."

Then at the top of the next page he says, in summarizing the legislation he proposes -- I have extracted the one item we are concerned with: (p.40)

"Summary of Legislation.

.

(4) The Commission shall have final decision as regards a matter of fact, it shall also have power to determine what constitutes a matter of fact and what a matter of law."

Then follow some extracts from the report that Professor McLean made three years later, that is, the report dated January 17, 1902:

Extracts from Professor McLean's Report dated January 17, 1902.
p. 74:

"The culmination of the movement which led to the handing over of all the regulative features of the Railway Act to the control of the Railway Committee was attributable to the fact that it had been recognized that a large body, whose duties were political, was unfitted to deal

with matters which were essentially administrative. Now, the body to which the exercise of this control has been handed over, is also political in organization" -- that is, the Railway Committee -- "and thus again the question of duality of function is brought up. The political duties of the Cabinet Ministers are too engrossing to permit of devoting themselves to all the intricate details of the transportation problem. When the Royal Commission recommended the placing of the regulative powers in the hands of the Railway Committee, it recognized that there were grave difficulties in the way. To quote the words of the report -- 'At the same time the Commission admits that serious objection may be taken to the selection of the Railway Committee of the Privy Council as the general railway tribunal. The members cannot leave their duties at Ottawa, and must therefore delegate to subordinates much very important workThey hold their office on a political tenure, and are liable to sudden change, whereby the value of their experience is lost. They " -- that is, referring to the members of the Cabinet or the Railway Committee -- "can scarcely be regarded by the public as absolutely removed from personal or political bias as independent members of a permanent tribunal. They cannot possibly give their exclusive attention to their railway duties, and in taking upon themselves the duties which would necessarily devolve upon them, they would in fact be performing judicial functions!"

THE CHAIRMAN: The Royal Commission referred to there, was that the one composed of Professor McLean himself, or was it--

MR. CARSON: That was one some time before this report was prepared. I cannot recall whether Professor McLean was a member of that Commission or not. But he goes

on to say:

"The argument contained in this quotation is as pertinent today.

As the Railway Committee is organized today, there is a lack of technical qualifications of fitness. While the Railway Act associates with the Minister of Railways and Canals certain members of the Cabinet, it will of necessity happen, that on matters of technical detail the Minister will be the only one fitted to pronounce. In strictness the Minister of Railways and Canals is the Railway Committee and the regulative policy pursued will vary as his interest in the matter of railway regulation varies. When a Minister of Railways and Canals is chosen, he does not necessarily come to the Cabinet as a man technically qualified on railway matters. In the administration of the affairs of this department, the duties are so multifarious that even when technical knowledge is acquired there is but little time to devote to the details of regulation. Coupled with this is the fact that, the exigencies of politics do not always permit of those who have acquired technical knowledge of railway affairs, in the administration of the department, continuing in such a position. In the matter of railway regulation there is a tradition, as well as a continuity of policy which is essential. While the Royal Commission did not provide the machinery to enforce its view, it was of the opinion that a body concerned with matters of regulation should be so organized as to permit of the sessions being held at different points. As the committee is organized today it is necessary for all complaints to be dealt with in Ottawa, and the expense and delay contingent on this

method of procedure tend to defeat the remedy. Where an organization is concerned with the enforcement of a regulative policy in a stretch of country extending from the Atlantic to the Pacific it is necessary that provision should be made for sessions being held in the different provinces. But the political organization of the committee prevents such an arrangement."

p. 76:

"The work of railway regulation is concerned with administrative not political problems, and should be placed in the hands of a body specially organized for the purpose, and independent of political conditions."

Then he summarizes his discussion and puts forward the conclusions that he thinks applicable to conditions in Canada:

p. 78:

"Summarizing the foregoing discussion the following conclusions applicable to conditions in Canada would appear:

(1) There must be great care in the definition of the powers conferred upon the Commission.

(2) The matters to be dealt with are concerned with administration and policy, rather than formal judicial procedure."

Now, I ask the Board to note number 3, because it is the first time we have this suggestion; it was not in his 1899 report.

"(3) Subject to an appeal to the Governor in Council the decision of the Commission should be final." I shall have something to say about that in a moment or two.

COMMISSIONER ANGUS: We have under 2 perhaps the first reference to policy. Do you consider that as different, the question of policy as something different, from a

question of law or a question of fact?

MR CARSON: Well, I do not know how far he is carrying that. He says "matters to be dealt with" -- that is, matters that are to be dealt with by this proposed Commission -- "are concerned with administration and policy, rather than formal judicial procedure." I rather think what he was thinking about there was the initial stages of this Commission, which would have to lay down some sort of policy as to the establishment of rates and the regulation of railways and that sort of thing.

COMMISSIONER ANGUS: On levels of policy matters it would be inevitably a political matter, wouldn't it?

MR CARSON: Quite so, quite so; and of course we have these sections that have been in ever since 1933, 36 and 38, which I shall have something to say about. They are quite different in their application from section 52(1). They provide for quite different things, 36, 38 and 52(1).

THE CHAIRMAN: The word "policy" is such a loose one. You might say it is the policy of the railways now to defeat aviation. The railways make up their minds to charge rates which will make it cheaper to travel that way, much cheaper than to travel by air. Talking of that, you might say it is the policy of the railways to supersede the claims---

MR CARSON: Yes, I see what your lordship means.

THE CHAIRMAN: I was just giving an idea of how indefinite a word the word "policy" is.

MR CARSON: Yes. Well, of course, what Professor McLean was doing here was making some general recommendations, and then we have to go to the Act to see how those recommendations were carried out.

"(4) There should be requirements in regard to technical qualifications for office, one commissioner should be skilled in law and one in railway business.

"(5) The commissioners should hold office on the same tenure as the judges."

I think I need only read the first sentence in the next paragraph.

THE CHAIRMAN: Pardonme a moment. He seems to desire that the Commissioners be appointed for life.

MR. CARSON: Yes, my lord.

"One part of the argument made by the Royal Commission in favour of putting the regulative provisions of the Railway Act under the control of the railway committee was concerned with the question of responsibility to Parliament. To quote the words of the reports, 'the political constitution of Canada recognizes direct ministerial responsibility to Parliament much more than in the United States, and therefore as a railway tribunal is necessarily tentative it seems . . . undesirable to remove its operation to its inception beyond the direct criticism and control of Parliament'."

That is parliament as distinct from the executive body.

"The caution here expressed is essential.

Ministerial responsibility to Parliament must be recognized."

Then he refers to the situation in England.

"In the Commission legislation of England, this is provided for by giving the Board of Trade a supervisory control in regard to the

Commission. If in Canada the decisions of the Commission may be reviewed by the Governor in Council either on appeal or of his own motion, ample provision will be made to safeguard the principle of responsibility."

Eventually the view he has there expressed was carried out by including in the Act what we now have as section --

THE CHAIRMAN: It refers to the Board of Trade. The Board of Trade in England is a department of government.

MR. CARSON: Yes, my lord. The section that provides for ministerial responsibility is now section 36.

THE CHAIRMAN: Of our Act?

MR. CARSON: Of our Act. That is the section that says:

"The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act."

THE CHAIRMAN: That just empowers the minister to direct the Board to go into some matter which is covered by the Act, of course.

MR. CARSON: Yes.

THE CHAIRMAN: He cannot go beyond that.

MR. CARSON: Quite so.

THE CHAIRMAN: Just pause a minute there.

MR. CARSON: Of course that is a very broad provision when read along with the other.

THE CHAIRMAN: I am going back to what you

said about the British system at the bottom of page 24.

"In the Commission legislation of England, this is provided for" --

That is, ministerial responsibility to Parliament.

" -- by giving the Board of Trade a supervisory control in regard to the Commission."

Does that mean that the president of the Board of Trade has about the same measure of control as our section 36 gives to the Minister?

MR. CARSON: Yes, I think so.

THE CHAIRMAN: You have not shown us --

MR. CARSON: I am going to come to the English legislation. If I may for a moment, I should like to turn to page 146 of our submission to carry through the history of it. At the bottom of page 146 we say:

"In Professor McLean's report and in the Commons Debates when the 1903 legislation was under consideration, it was recognized that if the regulatory tribunal proposed was to be successful, it had to have the confidence of all. The Hon. Mr. Blair, (1902 Hansard 4237) stated:-

' . . . the character, the capacity, the wisdom and the selection of the men is everything. Unless this Committee can afford men . . . of independence of character and of firmness and of fairness, men who have experience in business, experience in railway operation, experience in law . . . we cannot hope that the Commission . . . will be successful. We have to give these men such a tenure as will invite those we want . . . long enough to

induce them to give up a business.

We have to pay them well.'

"The ability to achieve the objectives as clearly expressed by the Hon. Mr. Blair is in serious jeopardy, because of the right provided in the Railway Act to appeal from the decisions of the Board to the Governor in Council.

"The history of the appeal from the railway regulatory body to the Governor in Council is a long one."

There is a brief summary of it here.

"Under the Railway Act of 1888 (Statutes of Canada, Chap. 29) an appeal was provided to the Governor in Council from the Railway Committee of the Privy Council. Professor McLean, in his report, recommended the retention of such an appeal. The reason he gave was that it was necessary to have such an appeal to safeguard the principle of ministerial responsibility."

Then I turn to page 25 of the argument.

Later, as everyone knows, Professor McLean became a member of the Board of Railway Commissioners for Canada and ultimately, the Assistant Chief Commissioner of that Board. His recommendations necessarily led to a new experiment in Canada. It would be too much to expect that everything he recommended would turn out by the test of experience to be desirable. One cannot help but wonder whether Professor McLean as time went on during his regime as a member of the Board, did not on many occasions have misgivings as to the effect on the work of the Board of the possibility of political intervention.

I have read the debates that occurred in the House of Commons in the session of 1903 and find the following discussion at page 254:

"Hon. Mr. Tarte: Would the hon. minister"--
He is addressing the question to the Minister of Railways.

" -- allow me to ask him whether there will be any appeal from the decision of the commission? I was not here and I did not hear any reference to that point.

The Minister of Railways and Canals:" --
Mr. Blair.

"The hon. gentleman (Mr. Tarte) was not here when I mentioned that there is an appeal provided for in the Bill from and against any and all decisions of the Board to the Governor in Council. That tribunal was thought to be the most useful to which to make an appeal for many obvious reasons. There is an appeal now to the Governor in Council from the Railway Committee. It is perhaps just as well that I should say that in the few years I have been connected with the Railway Committee that power has only been availed of on one occasion, -- "
That is, appeal from the Railway Committee to the Cabinet.
" -- and it is to be hoped that it will not be found very frequently necessary to appeal from the decisions of this Board."

There was, however, to be a vast difference between the right of appeal from the Railway Committee of the Privy Council to the Governor in Council and the right of appeal from the Railway Board to the Governor in Council. The Railway Committee was a committee of the Cabinet and no doubt a person who was dissatisfied with

the decision of the Railway Committee would not have much hope of a different view being taken by the Cabinet itself, which included the members of the Railway Committee. The Minister of Railways seemed to think at that time that it was a good hope that there would be few appeals from the Board to the Cabinet. No one seemed to envisage at the time this new experiment was being introduced of the effect of having the decisions of the newly constituted Board subject to being varied or set aside by the Cabinet. Certainly no one appeared to envisage the stultifying effect such a power would have upon the administration of the Board. In any event, one can well understand that in trying the new experiment, parliament would want to vest the government with some control over the newly constituted tribunal, because there had been a good deal of controversy about whether this was desirable. Then if you will turn to the brief at page 147 we refer to the number of appeals that have been taken and the number that were allowed. I think Mr. Covert's count is substantially the same. Then we quote from the view expressed in 1912 by the then Prime Minister during the hearing of an appeal. Then on page 148 we go on to say:

"Section 52(1) of the Railway Act is an invitation to the public to have railway problems considered in a political forum and to attempt to have such problems decided on political considerations rather than upon the merits and upon the evidence. Important railway problems should not be open to decision by a transitory body which must of necessity be. The Governor in Council the Governor in Council has not the time nor the training to consider the voluminous evidence developed in disputes of magnitude such as general

rate cases. Of necessity, therefore, the Governor in Council's decision must be given on considerations other than the facts and merits of the case. A right of appeal to such a tribunal is open to other abuses. It constitutes an invitation to parties in interest to make ex parte representations and thereby bring pressure to bear upon the tribunal. A striking example of such ex parte representations can be found in the representations made ex parte on three separate occasions in advance of the formal appeal, which was set down and argued in September 1948, from the judgment of the Board in the 21% Case. When the appeal came on for hearing, the Governor in Council set aside two days for that purpose. During the course of two days, seven provincial governments and the railways together attempted to present arguments based upon a hearing that occupied 150 days before the Board of Transport Commissioners.

"The shortcomings of political tribunals to deal with such complex matters as railway regulation are clearly pointed up in the following passage from the Report of Professor S. J. McLean to which earlier reference was made.

"The attempt to regulate such matter through politically organized bodies has not succeeded. The regulation is essentially an administrative function; an intermingling of this with political duties leads to lack of harmony and efficiency. The regulation of the railroad question, in the public interest,

demands technical training. It demands all the time of those engaged in such matters. They should be concerned, not only with the settlement of grievances when they arise, but also with an attempt to prevent grievances. The duties of political officials prevent the exercise of such functions. Under a system of private ownership and management of railways, the only efficient method of controlling them in the public interest is through entrusting such matter to an efficiently organized Railway Commission.'

"This and other references in Professor McLean's Report indicated that the prime purpose of establishing the Board was to remove railway regulation from the political arena and to place it in the hands of an administrative tribunal with the necessary technical training and assistants. As previously indicated, the Appeal to the Governor in Council from the Board was retained on the theory that it was necessary to preserve ministerial responsibility. Canadian Pacific submits that the retention of the Appeal, justified as it may have been in the transition period following the formation of the Board, no longer exists.

"In 1903 it was decided to take politics out of railway regulation. Either that decision was right and politics should be completely taken out of such regulation or it was wrong and an independent tribunal such as the Board should be instructed that in their decisions they must take into consideration not only the facts and merits of any dispute but also the political implications of their decisions."

THE CHAIRMAN: Pardon me a moment. When you say "In 1903 it was decided to take politics out of railway regulation" you are not overlooking the very Act itself which you are complaining about, which by section 52(1) left these questions to a certain extent in the hands of the government.

MR. CARSON: What we say is that they felt that was necessary during the transition period, and I am suggesting that they did not envisage the effect that would ultimately have as I am going to develop it in the course of this argument.

THE CHAIRMAN: The very Act itself passed in 1903 --

MR. CARSON: Yes.

THE CHAIRMAN: -- does create this appeal.

MR. CARSON: Yes, but they had hopes that it would not amount to much, as expressed in the debates, that there would not be many appeals. I do not think they foresaw how that could affect the strength and independence of the Board.

"The Railway Act provides for an appeal from the Board to the Supreme Court on matters of law and jurisdiction. The decisions of the Board of Transport Commissioners are final on questions of fact but Section 52(1) allows the Governor in Council to review, vary or rescind decisions whether of law or fact. Canadian Pacific submits that there is no necessity for an appeal on questions of fact from the Board. The Board, assisted by their experts and with their knowledge of transportation problems, and after hearing evidence, is the only body that can intelligently and equitably deal with disputes between the public, government

bodies and the railways. The protection of the public interest does not require an appeal from the Board to the Governor in Council. If the Board issues orders which are truly contrary to the public interest of Canada, the public is protected by the ability of the Minister to refer matters to the Board, by the ability of the Governor in Council to refer matters to the Board, and by the overriding ability of Parliament at all times to amend railway legislation."

Turning to page 20 -- perhaps at this stage I might refer to the English legislation so far as it concerns this particular matter.

THE CHAIRMAN: Where do you turn to?

MR. CARSON: I have to turn to some notes I have.

THE CHAIRMAN: In your argument where are we at?

MR. CARSON: I have some notes in my book on it.

I examined it at one time, and it is very lengthy and involved legislation. I only want to give your lordship a reference to the matter of appeal. Perhaps I might give your lordship and the members of the Commission a reference to the statute and then say what I have to say on the subject of appeal. The first English statute to which I refer is the Regulation of Railways Act.

THE CHAIRMAN: Just a moment. That is the matter I referred to a while ago, I suppose?

MR. CARSON: Yes, my lord. I think you asked me about it when I was reading from Professor McLean's report.

THE CHAIRMAN: Perhaps you were reading from your brief at that time. Here it is on page 24.

MR. CARSON: Yes.

THE CHAIRMAN: The quotation you give reads in part:

"The caution here expressed is essential. Ministerial responsibility to parliament must be recognized. In the Commission legislation of England, this is provided for by giving the Board of Trade a supervisory control in regard to the Commission."

That is the place.

MR. CARSON: Yes.

THE CHAIRMAN: What is the Act?

MR. CARSON: The Act is the first Act, Regulation of Railways Act, 1873, 36-37 Victoria, Chapter 48. Under section 26 of that Act there was provision for an appeal from an order of the Commissioners in this way. A party could apply to the Commissioners to rehear or reconsider. We have that today, of course. Then the section also provided that they could state a case on a question of law; but except for that, section 26 says:

"Every decision and order of the Commissioners shall be final."

There was no appeal in England on a question of fact.

Then in 1888 the next statute is the Railway and the Canal Traffic Act, 51-52 Victoria, Chapter 25. The purpose of that statute was to create in the place of the Railway Commissioners appointed pursuant to the 1873 Act, a new Commission called The Railway and Canal Commission. That is referred to in Professor McLean's report. In that Act, section 17 (1) provides:

(1) "No appeal shall lie from the Commissioners upon a question of fact, or upon any question regarding the locus standi of a complainant. (2) Save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior court of appeal."

There was no appeal on a question of fact but there was an appeal, leaving out the question of fact, to a superior court of appeal.

Then there was the provision in sub-section 5 that the decision of the superior court of appeals should be final, with a provision that in certain cases leave to appeal to the House of Lords might

be granted. Then in the Railways Act of 1921, 11-12 George V, Chapter 55, Part III of which deals --

THE CHAIRMAN: Did you say chapter 55, Mr. Carson?

MR. CARSON: Yes, chapter 55, my lord. Part III ^{the} deals with/railway charges and the constitution and procedure of the tribunal. Section 25 provides that the decisions of the tribunal - that is, the rates tribunal - shall not be subject to review except under the provisions in that part of the Act relative to appeals. And the only provision relative to appeals is Section 26 which reads in this way:

"Section 17 of the Railway and the Canal Traffic Act, 1888, shall apply in respect of appeals from the rates tribunal in like manner as it applies to appeals from the Railway and Canal Commission."

And then Section 17 is the one that I referred to, -- that is, of the 1888 Act - which provided for no appeal, save an appeal to the court of appeal.

Then we have the present Act, the Transport Act of 1947, 10-11 George VI, : chap. 49. It is provided in that Act by section 72, sub-section 3, that:

"The provisions of the tenth schedule ~~to~~ this Act shall have effect with respect to the powers and procedure of the transport tribunal."

And then paragraph (1) of the tenth schedule ^{to} gives/the transport tribunal "full jurisdiction to hear and determine all matters whether of law or of fact."

Then paragraph (5) of the schedule states:

"Subject to the provisions of this Act, sections 22 to 26 of the Railways Act, 1921 --

which contain provisions with respect to the constitution

and procedure of, and appeals from the transport tribunal.

"-- shall apply with respect to the jurisdiction conferred on the transport tribunal by this Act as they apply with respect to the jurisdiction conferred on them by that Act."

THE CHAIRMAN: How is this transport tribunal made up now? Of course, now all the railways are government railways.

MR. CARSON: They are all government railways, yes.

THE CHAIRMAN: What is the transport tribunal? If you can tell me shortly, I should like you to do so.

MR. CARSON: I hope I am accurate because I obtained this out of a great deal of legislation in England. But they have a permanent tribunal, and then they have two panels from which selections may be made to add to the number of the permanent tribunal. Of those two panels, there is a panel of twenty-two persons and another panel of twelve persons. The twenty-two persons are nominated by the President of the Board of Trade after consultation with such bodies as he may consider to be representative of trading interests. The twelve are nominated by the Minister of Labour after consultation with such bodies as he may consider both representative of the interests of labour and of passengers upon the railways. Then two are nominated by the Minister of Agriculture and Fisheries. Then there is another panel, called the Railway Panel which consists of eleven persons nominated by the Minister after consultation with the railways companies Association. That is like the Railway Association of Canada. One person is nominated by the Minister representing the railways and like railways that are not members of the railway association.

there is a constant reference to parliament for all they do. We shall have to look into that.

MR. CARSON: Yes. In looking at this English legislation, I found that conditions are different there. The only thing I was looking for was to see whether there was any provision for an appeal to the political tribunal.

THE CHAIRMAN: You mean even today?

MR. CARSON: Even today.

THE CHAIRMAN: With government ownership?

MR. CARSON: Yes. And I cannot find that there is any appeal. The appeal, when there is an appeal, is an appeal to the courts on a question of law.

THE CHAIRMAN: Of course, it is an entirely different situation.

MR. CARSON: A different situation, yes.

THE CHAIRMAN: The railways are all government owned and they submit their estimates to parliament.

MR. CARSON: Yes.

THE CHAIRMAN: It is a very different set-up.

MR. CARSON: Yes.

THE CHAIRMAN: For the moment can you give me the part of the older legislation that provides that the President of the Board of Trade shall have a supervisory control in regard to the commission? You have told us that you think it is something similar to our section 36.

MR. CARSON: Professor McLean mentioned that in his report.

THE CHAIRMAN: Perhaps you could find it so that we may have it.

MR. CARSON: Yes, if I can.

THE CHAIRMAN: Later on, I mean.

MR. CARSON: Yes.

Then there is a provision for calling in, in certain cases, members from these panels.

THE CHAIRMAN: It is as the result of these panels that the board created in that way fixes rates. Is that so?

MR. CARSON: Yes. There is a rates advisory committee under another statute. Then there is provision in Section 24 of the 1921 Statute to which I gave your lordship a reference, as to procedure if a vacancy occurs amongst the permanent members of the rates tribunal or if any permanent member of the rates tribunal is incapacitated by illness, and so on; if it happens to be the president that is ill or incapacitated, the Lord Chancellor appoints a person to act.

THE CHAIRMAN: That was the older legislation before government ownership.

MR. CARSON: Yes. But as far as I can find out, that still carries on.

THE CHAIRMAN: It still carries on?

MR. CARSON: Yes.

THE CHAIRMAN: The other day I noticed by newspaper reports that this tribunal decided to bring about an increase in freight rates.

MR. CARSON: Yes.

THE CHAIRMAN: And the proper Minister - I do not know whether he was the president of the Board of Trade, or maybe it was the Prime Minister himself - introduced a resolution into Parliament to sanction these increases. I suppose you noticed that.

MR. CARSON: Yes, I noticed it. And I also noticed that Mr. Winston Churchill took a view on it.

THE CHAIRMAN: That is apparently their way, at least when they increase freight rates. I do not know whether

Now, my lord, I come now to the top of page 27.

COMMISSIONER ANGUS: This question is troubling me a little bit, Mr. Carson. There may be an appeal on the question of fact, you say.

MR. CARSON: Yes.

COMMISSIONER ANGUS: But on a question of law is there still a possibility of a question of policy, where the question is: "Is this policy wise, or is it not wise?" - Does that fall under fact or under law, or is it treated as distinct from both?

MR. CARSON: There is no limitation of course in Section 52 as to what they may do. There is simply no limitation.

COMMISSIONER ANGUS: Under the English procedure.

MR. CARSON: Under the English procedure. The only appeal, if there is an appeal, so far as I can find, is an appeal to the court on a question of law.

THE CHAIRMAN: Well, except what may develop by a supervision from the Board of Trade over the administration.

MR. CARSON: Yes. I do not know how that is worked out.

THE CHAIRMAN: We will find that out later.

MR. CARSON: Yes.

The Commission will recall one of the passages I read from the 1902 Report of Professor McLean where in condemning the Railway Committee of the Privy Council as a tribunal to deal with the regulation of railways, he said at p. 74: "The political duties of the Cabinet Ministers are too engrossing to permit of devoting themselves to all intricate details of the transportation problem."

In the course of the 1903 Debates at p. 3555 of Volume 2 in a passage which I have not read before, the Minister of Railways, the Honourable Mr. Blair, made this

statement: "But there is no doubt whatever in my mind that the Railway Committee of the Privy Council, composed as it is of Members of the Cabinet, who have multitudinous duties to perform, is not a tribunal to do effective work..."

As we put in in our brief, on p. 148, "the Governor in Council has not the time nor the training to consider the voluminous evidence developed in disputes of magnitude such as general rate cases."

No better example could be found than what occurred when the seven complaining provinces had their appeal from the 21% decision set down for hearing before the Cabinet in September, 1948. We were notified in advance that the Cabinet could not devote more than two days to the hearing of the appeal and that the available time for argument of the appeal should be divided equally between the provinces and the railways. One could not help but be surprised that the Canadian Cabinet with all the problems that were pressing upon it at that time could devote even as much time as that to the hearing of the appeal.

What happened? The parties went before the Cabinet on a petition of the provinces that the 21% judgment should be set aside, or, in the alternative should be referred back to the Board. The matter had occupied 150 days of hearing before the full Board of six Commissioners, each of long experience. Some 413 exhibits, many individual ones being very large in volume, had been filed before the Board. No one would consider it offensive to the Cabinet to say that the six members of the Board who heard the case and who were unanimous in their view that no less than 21% increase should be granted had vastly more experience with the problems involved than the Members of the Cabinet who were to hear the appeal. The political pressure upon the Government from the time of the 21% judgment had been nothing short of overwhelming.

I am now going to refer to telegrams that were sent to the Prime Minister following the announcement of the 21% Judgment, so that the Commission will just see the way in which this political pressure developed. The first is a telegram from the Premier of British Columbia to the then Prime Minister. It is dated April 2, 1948. The Judgment was delivered on March 30. The telegram is as follows:

C O P Y

VICTORIA, B.C. 1948-APRIL 2.

RIGHT HONOURABLE W. L. MACKENZIE KING,
PRIME MINISTER OF CANADA, OTTAWA.

GOVERNMENT OF BRITISH COLUMBIA PROTESTS STRONGLY ANY INCREASE IN FREIGHT RATES UNDER RECENT RULING OF BOARD OF TRANSPORT UNTIL SUCH TIME AS THE MOUNTAIN DIFFERENTIAL AFFECTING BRITISH COLUMBIA AND ALBERTA IS REMOVED STOP EXISTENCE OF MOUNTAIN DIFFERENTIAL CONSTITUTES A GRAVE INJUSTICE UNDER ORDINARY CIRCUMSTANCES STOP IMPOSITION OF A TWENTY-ONE PER CENT INCREASE IN FREIGHT RATES WOULD FURTHER ACCENTUATE THE INJUSTICE AND PLACE BOTH BRITISH COLUMBIA AND ALBERTA IN VERY DISADVANTAGEOUS POSITIONS WITHIN CANADA'S ECONOMY STOP STRONGLY URGE THAT RULING OF BOARD OF TRANSPORT COMMISSIONERS BE WITHHELD FROM OPERATION UNTIL SUCH TIME AS BRITISH COLUMBIA GOVERNMENT HAS OPPORTUNITY TO APPEAL AGAINST THE DECISION.

BYRON I. JOHNSON,

PREMIER OF BRITISH COLUMBIA

Then the Premier of Manitoba addressed a telegram to his Excellency, the Governor General and Council, Ottawa. This is not taking steps by way of appeal. This is putting forward their views to the appeal tribunal, but not taking the appeal procedure under section 52 (1). That telegram reads as follows:

(COPY)

WINNIPEG MAN.

APRIL 3, 1948.

His Excellency, The Governor General and Council
OTTAWA.

Pursuant to section fifty two of the Railway Act the government of the Province of Manitoba hereby petitions that your Excellency and Council may be pleased to vary order number seven naught four two five of the Board of Transport Commissioners for Canada dated March thirty nineteen forty eight so as to provide that the said order shall not become operative until at least thirty days after the date thereof or until further order STOP The Government of Manitoba considers that the said order is not in the best interests of Manitoba or of Canada as a whole STOP The decision if made effective will mean smaller returns to our agricultural and other primary producers and will add to the already excessively high living costs of all Canadians STOP The order permits higher tariffs to be published and filed on not less than three days notice STOP This does not allow sufficient time for a formal petition to Your Excellency in which our objections can be set out with greater force and in detail STOP The provinces which oppose the application desire the opportunity to meet and consider the judgment and to formulate their grounds of appeal and it would be manifestly unjust to allow the higher rates to go into effect before they have had this opportunity. Furthermore the recently announced financial results of the Canadian Pacific Railway during nineteen forty seven are such that in our opinion they confirm the fact that the Canadian Railways would suffer no undue hardship if the effective date of the order were postponed.

STUART GARSON

Mr. Carson

Then there is another telegram from the Transportation Commission of the Maritime Board of Trade. The first paragraph is full of protest:-

"Halifax, N.S.,
April 3, 1948.

"His Excellency
The Governor In Council,
Ottawa.

"May it please your Excellency. The Transportation Commission of the Maritime Board of Trade representing, as it does, the Governments of the three Maritime Provinces over seventy Boards of Trade in the Maritime Provinces and a large number of industries in the Maritime Provinces, desire to inform you that they are very much dissatisfied with the decision and order of the Board of Transport Commissioners of Canada delivered and filed on March 30. They consider that the effect of the decision and order of the Board will be to prejudice and very seriously affect a large number of our agricultural, manufacturing and producing industries, will materially increase the cost of living, will undermine the whole economy of the Maritime Provinces and will cause great hardship to our agricultural and industrial workers and substantially increase the number of unemployed. They consider that the basis on which the whole decision was made is erroneous and further that the decision is in complete violation of the Maritime Freight Rates Act and that its effect is to destroy the protection which was given to persons and industries in the Maritime Provinces under Section 8 of that Act.

"Under instructions from the Governments of the three Maritime Provinces this Commission

intends to appeal from that decision and order, either to Your Excellency in Council, or to the Judicial Committee of the Privy Council or to The Supreme Court of Canada, but requires further time before the Board's order becomes effective to consider the decision and to decide upon the proper tribunal to which an appeal should be asserted. Moreover, as the four Western and the three Maritime Provinces are acting in unison in matters in which we have a common interest we require sufficient time for consultation with representatives of the Governments of the Western Provinces and then after full consideration of the decision to decide as to the proper appeal tribunal and to prepare the necessary application in connection therewith. When the proper tribunal is agreed upon an application will be made to that tribunal to suspend the order of the Board of Transport Commissioners pending final decision on the appeal.

"The Board's order provides for the new rates to come into effect on three days notice after the tariffs are filed, instead of the usual thirty days provided by Section 331(3) of the Railway Act, and it is probable that new tariffs will be posted early next week.

"We urgently request and petition your Excellency that under the authority vested in you under Section 52 of the Railway Act you immediately vary the order of the Board dated March 30, so as to provide that that order will not become effective for at least thirty days from the date thereof. This will give

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time for this Commission and the Governments of the three Maritime Provinces to confer with the Governments of the four Western Provinces and agree upon the tribunal to which the appeal will be taken and the nature of the relief which may be requested upon such appeal.

"This petition is sent to you with the approval and authorization of the Governments of the three Maritime Provinces. And your petitioner as in duty bound will ever pray, etc.

Transportation Commission of the Maritime
Board of Trade. D.R. Turnbull,
Chairman."

That was on April 3, Then on April 5, the same organization addresses a telegram to the Clerk of the Council and Secretary to the Cabinet:

"Halifax, N.S.
April 5, 1948.

A.D.P. Heeney,
Clerk of the Council and
Secretary to the Cabinet,
Ottawa.

"We have received your telegram of April 5, in which you inform us that our petition of April 3 will be submitted to Cabinet at earliest opportunity. We have received today Canadian Freight Association Tariff number 71 C.T.C. Number 1427 establishing increased rates as per Board's order, the rates to become effective on April 8. Unless Governor in Council takes action to vary the effective date of ^{the} Board's order so that it will not become effective for at least thirty days

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from its date as requested by this Commission the new rates will come into force on April 8. We would therefore urge that consideration be given to our petition to Governor in Council before that date.

D.R. Turnbull,
Chairman Transportation Commission
Maritime Board of Trade."

Then Mr. Manning of Alberta sends a wire on April 5:-

"Edmonton, Alberta
April 5, 1948.

"Right Honourable W. L. Mackenzie King
Prime Minister of Canada,
Ottawa, Ontario.

"We understand that the railways have today filed new tariffs containing increased freight rates to become effective in three days. We respectfully suggest that this action by the railways indicates a need for urgency on the part of the Governor General in Council to take action under Section 52 of the Railway Act and postpone the time for bringing increased rates into effect pending determination of our appeal to the Governor General in Council against the Transport Board's decision.

E. C. Manning, Premier."

Then Mr. Douglas comes through from Saskatchewan on the seventh:-

"Regina, Saskatchewan
April 7, 1948.

"Right Hon. W. L. Mackenzie King
Prime Minister of Canada, Ottawa.

"Re Board of Transport award on freight rates.

Mr. Carson

"Government of Saskatchewan extremely concerned with question stay of proceedings until petition dealt with stop Most strongly and respectfully urge consideration our request stop Our Information as to tariffs filed indicates chaotic condition of uncertainty will prevail with shippers and freight payers generally if railways are permitted proceed as apparently they are doing stop Impossible assess present situation in light tariff schedules now filed stop Again strongly urge stay of proceedings by Governor in Council as essential to meet present situation.

Signed, T.C. Douglas"

The Commission will see that the governor in Council and the Prime Minister were deluged with these telegrams from the seven provincial premiers.

7. These telegrams were the first of three ex parte representations made by the complaining provinces of which we are aware. The Provincial Premiers descended upon the Cabinet in Ottawa on April 26th, 1948 and left with the members of the Government a brief containing their representations. Again on 20th July, 1948, the Provincial Premiers met the Dominion Cabinet and presented another brief. This was the third occasion of which we are now aware when ex parte representations were made against the judgment.

We only learned of these meetings with the Cabinet as a result of the disclosure made by certain material filed by the provinces when they applied to the Board in September 1948 to stay the hearing of our application for the 20% increase. The Prime Minister of Canada sought to discourage the proposed appeal. This was apparent from a letter written by Mr. Mackenzie King to Mr. Macdonald, the Premier of Nova Scotia, under date of July 1, 1948, in which Mr. Mackenzie King said:

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"Further consideration has also been given by the government to the request that Board Order No. 70425, that is, the 21% order, should be suspended. This, in effect, is a request that the government substitute its judgment, in regard to the technical problems involved, for the judgment of the Board. The government has concluded that it should not now intervene in the Board's decision. If the provinces, however, consider that a formal appeal against the Board's order is necessary, the government would of course be prepared to make appropriate arrangements to grant a hearing of the appeal."

In the brief submitted to the Federal Cabinet under date of July 20, 1948, the Provincial Premiers summarized the objections put to the Cabinet on the earlier occasion of 26th April. One of the April objections as summarized reads as follows in the Provincial brief:

"The general public affected by the Order of March 30 has lost confidence in the Board."

In my respectful submission that is a pretty sweeping statement for the seven premiers of provincial governments to make.

Beyond that we are not aware of what representations were made by the Provincial Premiers with respect to the personnel of the Board which had sat on the 21% Case. Be that as it may, changes in the personnel of the Board were under way by 1st July, 1948, as appears from the following passage from the same letter of Mr. Mackenzie King to Mr. Angus L. Macdonald:

"Changes in the personnel of the Board of Transport Commissioners, as you are aware, are now under way. After long and able service, the Chief Commissioner, Colonel J. A. Cross, has resigned and steps were taken by Parliament which

the first of the year 1900.

The first of the year 1900.

The first of the year 1900.

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The first of the year 1900.

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"have made possible the appointment of Mr. Justice M. B. Archibald to the Exchequer Court of Canada and subsequently to the Chairmanship of the Board. The term of office of one of the other Commissioners expired on June 30th. The vacancy thus created will be filled by the appointment of a new member of the Board."

The brief review I have given of some of the events will give your Commission some idea of the political atmosphere in which the appeal to the Cabinet was heard on September 27th and 28th, 1948. As the Commission is well aware, the Governor in Council did not set aside the 21% judgment, but with the terrific political pressure which had been applied and with a Federal election a few months in the offing, it is not at all surprising that the Cabinet felt compelled to refer the matter back to the Board for review, as was done by P.C. 4678. That Order in Council demonstrates by its very terms the impossibility of busy Cabinet Ministers being able to understand in a two-day argument in a case that took 150 days before the Board, the intricate and complex questions that were involved. This can be simply and shortly illustrated.

8. Turning to that Order in Council, the Commission will find that the Order in Council contained the following statement:

"The Committee are further of the opinion that an investigation should be made by the Board in order to determine the apportionment to be made, between railway earnings and other income, of fixed charges, depreciation, income taxes, dividends and surplus..."

THE CHAIRMAN: Just a moment, that is 4678?

MR. CARSON: That is 4678, my lord, yes. That

is where the Committee expressed their opinion as to apportionment.

THE CHAIRMAN: I am just trying to find it in the order.

MR. CARSON: I don't know whether my file is the same as your lordship's.

THE CHAIRMAN: Yes, I think I have it here, on page 3 of the Order-in-Council.

MR. CARSON: Yes.

THE CHAIRMAN: "The Committee are further of the opinion that an investigation should be made by the Board in order to determine the apportionment between railway earnings and other income, fixed charges, depreciation...." Yes, that is the one.

MR. CARSON: Yes, I ask your lordship to note these five items of apportionment of fixed charges, depreciation, income tax, dividends and surplus.

Now then, the Governor in Council failed to appreciate the following undisputed facts:-

(1) That the depreciation charges included in the Canadian Pacific exhibits did not include charges for depreciation on any property other than rail property (and that is a simple undisputed fact);

(2) That the corporate income taxes had already been apportioned as between Other Income and rail earnings in the 21% judgment.

(3) That the rates of dividends claimed by the Canadian Pacific had been allowed by the Board as proper rates of dividend to be provided by rail earnings only.

(4) That the surplus allowed by the Board was not a surplus in respect of the entire corporate enterprise, but was a surplus claimed as necessary and indeed was

allowed solely in respect of the rail enterprise.

These misunderstandings of the Governor in Council of the four very important items, were recognized by the Board on the review pursuant to the Order-in-Council - -

THE CHAIRMAN: Pardon me a moment, are you telling us then that the Board had already made the apportionment which this order directed them to make?

MR. CARSON: In effect, yes, that is what it was, on these four items. No Other Income entered into these four items.

THE CHAIRMAN: Now, are you going to tell us what the Board did as a result of that?

MR. CARSON: Yes. These misunderstandings of the Governor in Council of the four very important items, were recognized by the Board on the review pursuant to the Order-in-Council and no apportionment was made as between rail and non-rail earnings of depreciation, income taxes, dividends or surplus. In that connection I refer to the following passage from the judgment of the Assistant Chief Commissioner at page 18, that is of the blue pamphlet print, and I would like to read from towards the bottom of 18:- -

THE CHAIRMAN: Just a moment, I would like to follow this, what page?

MR. CARSON: Page 18, my lord, about two-thirds down:-

"I do not think that under the Act there can be a 'direction' to the Board to do that which the Provinces allege should be done by the Board under the Order-in-Council.

In any event how the amount of depreciation as found in the Judgment as proper, after adjustment, and which is purely railway as opposed to non-railway depreciation, can be apportioned was even beyond the suggestions of the Provinces."

They landed back there with what they regarded as a great victory, but when it came to suggesting how you could apportion railway depreciation, pure railway depreciation, as between it and Other Income, ^{that} /is beyond their suggestion:-

"Likewise with surplus, which admittedly on the part of the Provinces was surplus asked for railway operations as opposed to non-railway operations. So these two items at least would bear no apportionment.

"The Order-in-Council in mentioning fixed charges, income taxes, dividends and surplus, refer to these as corporate obligations and that some portion of these corporate needs should be borne by the income derived from non-rail operations. When the Board wrote its Judgments it did not lose sight of this principle and certainly would not dispute it. But what the Board had to do was to find what, under all the circumstances, were proper and reasonable charges to allocate against rail operations upon which a just and reasonable level of rates could be arrived at.

"As one who participated in the Hearing of the original application and in the deliberations following the Hearing and the discussions with the Board's experts, I know with what care and thought the whole matter was approached."

THE CHAIRMAN: Who is talking now?

MR. CARSON: That is the Assistant Chief Commissioner. He is the only one of the three who had sat on the earlier cases.

"Insofar as income taxes were concerned, the Board while allowing income taxes as a proper charge to operation, very definitely refused to allocate against rail operations any income tax which would accrue by reason of accretion of non-rail income such as income from investments, steamships, hotels, communications, office buildings and other ancillary services. In other words, the Board at that time apportioned or allocated to rail operations only that portion of the corporate income tax requirements applicable to rail earnings."

So that, my lord, that simply serves to show how impossible it was for the Governor in Council to even comprehend what some of the vital issues were.

THE CHAIRMAN: Is that a dissenting judgment? It is called a minority judgment.

MR. CARSON: It is the minority judgment only in the sense that the Assistant Chief Commissioner would have made the interim increase 15 instead of 8.

THE CHAIRMAN: Now then, do these considerations that were set out in this judgment, are they to be found likewise in the majority judgment? Did they make the same disposition of this direction to apportion, and so on?

MR. CARSON: Well, I don't think he deals with that. For instance - -

THE CHAIRMAN: You see, this judgment you have just read us is what the minority thought.

MR. CARSON: Yes, I know what your lordship has in mind. They did apportion fixed charges.

THE CHAIRMAN: That is, the majority judgment?

MR. CARSON: Yes, and I think the Assistant Chief Commissioner -- well, I have forgotten. He disagreed on that, but we will take this majority judgment which apportioned the fixed charges. On page 4 of the majority judgment your lordship will see that.

"Dealing first with reference to the Board by Order-in-Council P.C. 4678, in my opinion no new evidence was furnished by the Board or new matters drawn to its attention which would justify disturbing the findings of the Board with respect to the following matters."

Then your lordship will see under (d) "Dividends".

Then he deals with fixed charges, and when he comes to depreciation the learned majority judgment does not apportion depreciation in any sense. There is no suggestion of apportionment. He did reduce the amount of the charges to depreciation still further, but he was not apportioning it as between rail and non-rail, because, as I say, there was no non-rail depreciation included in the exhibits at all. Then he made some adjustment about income tax, but not apportionment. So that the majority judgment and the minority judgment, neither one makes any apportionment of dividends, of surplus, of income tax or depreciation.

THE CHAIRMAN: Well, what would you say they really did as a result of this direction back from the Government?

MR. CARSON: As a result of the direction back from the Government, just taking it in a word, the majority

judgment did apportion fixed charges. They made some reduction of our depreciation charges; they made some adjustment in the income tax, not on the matter of apportionment; and then arrived at a formula which later became a matter of dispute.

THE CHAIRMAN: To what extent, if at all, did they order the allowance of the increase? Was the increase allowed by the first judgment, the one reduced by this second?

MR. CARSON: What happened was that the 21% increase was in effect; the new Chief Commissioner at page 7 of this blue judgment amended the formula upon which the earlier Board proceeded and he said:-

"It follows" (from my change of the formula)
"that the additional revenue necessary ... to meet"

(the new formula) deficiency, there would be required a general increase in freight rates of 15% together with an increase of 25¢ per ton on coal and coke."

THE CHAIRMAN: That is 15 instead of 21?

MR. CARSON: Twenty-one, but now then, the Commission will appreciate what he was doing. This was in September 1949, and in the judgment of the 21% Case back in March 1948 that Board arrived at 21% on the assumption that traffic volume would continue the same in 1948, that cost of operation would continue the same in 1948 as in 1947, and would bring the Canadian Pacific out at the end of the year with an even balance sheet and a little to spare.

Now, in July 1948, they had this 17 cent wage award come upon them. That was made retroactive to March 1, 1948, and the whole assumption upon which the

21% judgment was based was thrown out of gear and did not apply. I have never interpreted the judgment of the Chief Commissioner in the 8% Case as saying that he felt that at that time 21% should then be reduced to 15%. What he was saying in effect was: "If I had been sitting in the armchair of my predecessor back in March 1948, on the formula that I now adopt I would have said 15% was enough." But then, since March 1948 the present Chief Commissioner was not in the position where he was speculating as to what would have happened in 1948. He had the actual results, and I am going to refer in a little while to show what even on the last formula of the Board the deficiency of the Canadian Pacific was with the 21% in effect.

THE CHAIRMAN: We will adjourn for a few minutes.

Recess

MR. CARSON: My lord, I am trying to avoid getting into by-ways of other branches of the case by directing this part of the argument solely to 52(1).

THE CHAIRMAN: Yes, I know, 52(1).

MR. CARSON: Yes, now, turning to page .31 of my notes, from what I have already referred to as to the way the - -

THE CHAIRMAN: I don't think you have drifted from the point at all.

MR. CARSON: I am trying not to.

THE CHAIRMAN: Because you are asking that 52(1) be repealed.

MR. CARSON: Yes, my lord.

THE CHAIRMAN: And I think it is quite pertinent to show what has occurred.

MR. CARSON: Yes, what I was trying to take out of the Order-in-Council 4678 in the light of what was not in dispute really, is this, that it simply serves to show how impossible it was for the Governor in Council to even comprehend what some of the vital issues were, still less how impossible it would be for him to give them any informed consideration.

9. But it will be said what a great wrong would have been done to the Provinces if the appeal in that Case had not been available to them. If that suggestion is made, I meet it with the firmest challenge. The very fact that the 21st Judgment was referred back to the Board by an Order-in-Council containing an expression of Government opinion (which upon the major issues was as I have pointed out entirely erroneous) put the Board in a position that could be described, to put it mildly, as embarrassing.

The review of the unanimous decision of a six man Board was undertaken by a Board of three, two of whom and, with all due respect to them, were new appointments and had only commenced their experience in the matter of railway administration under the Act. In my respectful view, the majority judgment of 20th September, 1949 delivered by the new Chief Commissioner and concurred in by the new Commissioner, Mr. Chase, was not only wrong in law, but was wrong in other respects, in questions of fact. We -- that is, the railways -- can have no appeal on a question of fact, but our submission that it was wrong in law was unanimously upheld by the Supreme Court of Canada. To bring the matter down to date, the judgment of the Board in its final determination of the 20% Case delivered on March 1, 1950, when it substituted a 16% increase for the 8% interim increase, is in my submission an erroneous judgment. Under date of March 10th last we launched an application to the Board to re-open its 16% judgment on the ground of error, and to substitute a rate increase of 20% for the 16% and in the alternative to extend the time for leave to appeal to the Supreme Court of Canada. Argument of that application, with the usual provincial opposition, was heard by the Board on April 17th last. There has been no judgment yet.

No tribunal could be expected to function impartially and efficiently with the threat of interference due to political pressure constantly hanging over its head.

Counsel on the provincial side are fully aware of the weapon they have in having the force of this threat casting its shadow over the Board.

This is plainly illustrated in the transcript of the proceedings on 17th April last when we were before the Board on our application to correct the error resulting in the 16% judgment.

p. 6120 - Argument by Mr. McLean on behalf of Manitoba
.....

"Now it is not my purpose, sir, to reiterate the argument which I made at the conclusion of the final hearing of the 20% case -- the Judgment arising out of which is the subject of these proceedings."

You see, it was our application to re-open, not the provinces'.

Then at page 6125, five pages farther on, he says:

"Now coming to the gist of my argument we say that the Board failed to give full or proper effect to our submission with respect to the additional revenues available to the Canadian Pacific Railway Company arising out of the increases in effect during 1949, but only in effect for a short time.

In other words we are quarrelling -- and my burden is to quarrel with the penultimate paragraph on page 15 and we say that the effect of that has gone and then there is no necessity for revising the percentage.

MR CARSON: Then my friend is doing exactly what he suggested he was not doing -- when he says that the Board failed to give proper effect to his submission on those points, then he is here asking the Board, in effect, to hear an application to re-open." That is, an application by the provinces to have their arguments reconsidered.

"There is no such application before the Board and my submission is that his statement now makes it clear that my friend is doing the very thing that he claimed that he was not going to do and in any event that which he should not be permitted to do."

That is, because he had not filed an application.

"Mr. McLEAN: Well I am perfectly willing to place

myself in the hands of the Board and we will go up to another tribunal if there is any necessity for that.

MR CARSON: Now Mr. Chairman, it is regrettable that remarks like that should be made by my learned friend."

Now, as I interpreted that, there was the tone of threat in it, and I thought it was a highly improper thing to put to the Board.

"THE ASSISTANT CHIEF: Just a moment, Mr. McLean, you go ahead and we will give whatever weight we think proper to what you may say."

10. I say to this Commission without any hesitation and with all respect to all the members of the Board of Transport Commissioners who have been engaged in these rate matters in the last three years, that one of the major causes of the trouble that has arisen is due to the right of appeal to the Governor in Council provided by Section 52(1). The Board throughout these proceedings striving, as I am confident it has, to perform its functions honestly and efficiently, has been confronted with a vigorous and sustained opposition to rate increases conducted by Counsel on behalf of seven Provincial Governments, and was no doubt aware of the political pressure that was being put upon the Federal Cabinet, which had the power to deal with the Board's decisions on appeal under section 52(1). It is simply too much to expect that the Board could feel the freedom of action that was so necessary to the proper and impartial performance of its quasi judicial duties.

Now, on Monday last you, Mr. Chairman, put the question to Mr. Smith in his argument, at page 22502 of volume 125:

" . . . would you not be better off before a court of justice?

MR SMITH: No, I do not think so. I think that it has been very satisfactory."

Of course it has been very satisfactory.

I just pause to remind the Commission of the way Mr. Walker put his view, in volume 64 at page 13367. He was referring to the submissions made by some of the provinces that there should be more control by the executive arm of Government, and toward the bottom of that page he expressed the opinion:

" . . . neither 'public opinion' (for which the clamour of pressure groups may so readily be mistaken) nor the Government as an interpreter of such public opinion could possibly take the impartial and judicial view of its financial needs to which any public utility corporation is entitled. Why should anyone seek to avoid having such issues determined by an impartial administrative tribunal? The answer must surely be found in a fear that the contentions to be raised against the railways would, in some measure at least, be unacceptable to such a tribunal."

Now coming to another branch of this same subject, I say as a heading on page 33:

This right of appeal to the Governor in Council undoubtedly induces Board to give thought to how its decisions will be viewed by public.

11. There can be no doubt that because the decisions of the Board are subject to review by a political tribunal, it is unconsciously induced on occasions to give consideration to how its decisions will look to the public. No tribunal exercising judicial or quasi judicial functions should have its deliberations affected by any such thinking.

The Commission will please understand that in making these observations I am directing no criticism to the members of the Board and desire to emphasize that any such

thinking on their part is not in any sense deliberate, but is an effect that is produced unconsciously by reason of the possibility of political intervention.

12. May I refer to an illustration of what I mean?

At the time the application for the 30% increase was launched in October, 1946, railway rates were subject to price control and for that reason the application was not alone for the approval of the proposed increase by the Board, but for the concurrence of the Wartime Prices and Trade Board.

In September, 1947, during the course of the hearings before the Board, price control was removed and the railways promptly filed tariffs increasing their competitive rates by 30%, as they were entitled to do without the sanction of the Board of Transport Commissioners. The Provinces promptly applied to suspend the increase in competitive rates on the footing that because at the time the application was launched -- that is, in October 1946 -- it related to all rates, and therefore the proposed increase in competitive rates should await the judgment of the Board in respect of the entire application.

During the course of my argument on the matter the following discussion took place, see Volume 799, p.15005:

"THE CHIEF COMMISSIONER: What I would like somebody to tell me is -- with no disregard of the legal provisions, but we must have regard to it, that is: When all these rates are before us, the railways propose to increase one class of rates, all of one class of rates, namely, competitive rates, by 30%, so long as the putting on of the 30% does not go through what are called normal rates. Now, it may be all right and it may not; but how does the thing look?

MR CARSON: How does it look as a matter of law?

THE CHIEF COMMISSIONER: No, how does it look as a matter of practical business and commerce to the country if, while this enquiry is going on, an increase is made in one class of rates of, generally speaking, 30%? Maybe somebody will tell me something about that.

MR CARSON: May I say something?"

Mr. Evans always tells me he was pulling my coat-tails at this time, that I was looking a little too vigorous.

"THE CHIEF COMMISSIONER: No, no, not now. We have not the time, probably, but I am looking at it from its practical effect. I am not quarrelling with your law.

MR CARSON: I quite appreciate that and I think you will be hearing something about it.

THE CHIEF COMMISSIONER: No doubt, and of course you have the right to do it. You can make it such percent as you like.

MR CARSON: Well, if parliament has left it that way we are entitled to do it.

THE CHIEF COMMISSIONER: Yes, if parliament has left it that way, you are entitled to do it" -- and then he is rather getting off the subject a little --

"and Mr. Evans is going to tell us something about discrimination; I would like to know how discrimination is removed by increasing special rates 30%, generally speaking. Maybe I am expecting too much.

MR CARSON: I think we are all obliged to you.

THE CHIEF COMMISSIONER: I raise these questions just purely on my own account."

This occurred just as the afternoon adjournment

was about to take place and on the following morning I stated our position in the following passage at p.15011:

"Now, first, I say it has to be assumed that the Board will give effect to the legal rights of the parties appearing before it. If the railways have the legal right to do what they have done -- as we submit they have -- it follows that that legal right will be upheld by this Board. When you put it to me, Mr. Chief Commissioner, 'How does the thing look my answer is that it must look perfectly all right, if the railways are doing what they have the legal right to do; in other words, if they have the legal right to do what they are doing.'"

THE CHAIRMAN: Pardon me a moment, Mr. Carson. On the other hand, what legal right had the Board at that moment, or had it any? I am not saying it had any. But here you proceed to raise a certain class of rates by 30 per cent.

MR CARSON: Competitive rates.

THE CHAIRMAN: Now, had the Board any legal right to intervene there and then and compel you to reduce that increase?

MR CARSON: It was our submission that it had not, but they held against us. There was a majority held against us on that.

THE CHAIRMAN: They held that it did have a legal right?

MR CARSON: Not a legal right, but they rather put it as a matter of discretion, that since we had included in our rate application when we were under price control an application to increase competitive rates and all rates by 30 per cent, that even with the removal of price control, which removed the only legal barrier to our increasing com-

petitive rates, since there was an application pending before the Board, in the exercise of their discretion they would suspend -- I am not saying they did not have the legal right to suspend, but I am saying that what we did was an exercise of an undoubted legal right that we had under the Act of Parliament. We did not have the legal right so long as price control was in, but the minute it went out we were just as free as we are today to increase a competitive rate, as long as it does not go above the normal rate.

THE CHAIRMAN: But is not the Board also just as free? Was it not just as free then as it would be today to disallow or increase? Is that so?

MR CARSON: Not on competitive rates, no, my lord.

With all respect to the then learned Chief Commissioner, it was quite apparent that his thinking on that important issue was much concerned with how it would look to the public if the Board permitted the railways to exercise their undoubted legal right to increase the competitive rates at that time. In other words, the learned Chief Commissioner was not considering the matter solely from the standpoint of law, but was unconsciously having his mind influenced by public opinion, which in the final analysis would make it difficult for him to give impartial consideration to the question.

Hanging over his head was Section 52(1) and the knowledge that public opinion could exercise its pressure through political channels upon the Governor in Council to such an extent that a decision giving effect to the railways' legal right might well be upset not on any legal grounds, but only because such a decision would prove to be embarrassing from a political standpoint.

THE CHAIRMAN: Now, Mr. Carson, you are presuming

there that the reason why the Chairman used the language he did use was because there was this appeal which was possible against whatever the Board did. Are you quite sure that is entirely correct?

MR CARSON: My lord, I do not want to put it too high, I do not want to put it too high. I am saying it is that this thing is hanging over their heads, and they are driven to wondering how a thing may look.

THE CHAIRMAN: In the event of an appeal. You have it, though, that it is because of an appeal that they are supersensitive, I suppose, as to what they do. Is that it?

MR CARSON: Quite so. That is, there is a---

THE CHAIRMAN: I put it, though, if there was no appeal, the public is still there, you see.

MR CARSON: The public is still there, but---

THE CHAIRMAN: And you see what happens, when the public represented by the premiers of seven provinces, after a certain decision of theirs -- I mean, even if there had been no appeal, might there not have been the same outcry, the same protestation, and all that sort of thing? That is to say, is it right to assimilate applications of this sort, which have such an effect throughout the whole country, to a simple civil lawsuit, where you have Smith against Jones, which is nobody's business but the business of the parties? The public are not concerned, as you say, in that kind of thing, and most rightly so. You cannot consider them; it is none of their business. There are certain lines of litigation where the public is to a certain extent concerned, like in divorce cases, where you have the King's Proctor, and so on, but in the ordinary civil litigation the public is not concerned, and there is no what we may call reaction one way or another. But is it

going to be possible, no matter how you devise the procedure for the future, to remove public concern entirely?

MR CARSON: Oh, I am not suggesting that public concern will be removed, but I am suggesting this: To begin with, there is always Parliament; Parliament is there to change the law.

THE CHAIRMAN: Yes.

MR CARSON: But my view is that when Parliament makes a law, whether it is railway law or bankruptcy law or any other law, that law should be administered by a tribunal that is independent of any feeling of political pressure as to what the effect of their judgments may be.

THE CHAIRMAN: Yes, I know what you are aiming at. I am just wondering whether, if you abolish this appeal to the Privy Council, you attain that end. You may make a step towards it.

MR CARSON: I think we make a very important step towards it, because as long as you have 52(1), that says the Cabinet may do this thing -- it is not Parliament, where the thing is threshed out and debated by all parties in the Railway Committee or something like that before legislation is put upon the statute books.

THE CHAIRMAN: You see, to what extent the public is concerned is illustrated by what you and I were referring to a while ago, what has just occurred in England. They divide Parliament on the question of whether or not these rates shall be increased. So you must be careful in attempting to assimilate too closely---

MR CARSON: My lord, I hope I am realistic enough to realize that public clamour---

THE CHAIRMAN: It is different from a decision---

MR CARSON: There will always be public expressions of opinion and clamour about this, but in my view

there would be a vast difference---

THE CHAIRMAN: You must not expect it to be capable of setting up a system for you which will not resound in public opinion after a decision is given.

MR CARSON: My lord, I am coming to what has happened in the United States and how they have dealt with it over there. I have told you how they have dealt with it in England. I am going to refer to how some of these very provinces deal with their regulatory tribunals. But what I am trying to get at is to lift this thing out of politics, so that---

THE CHAIRMAN: In so far as possible.

MR CARSON: In so far as possible.

THE CHAIRMAN: Yes, I see. All right, go on. At least you are trying to show us how the situation would be improved.

MR CARSON: Improved.

THE CHAIRMAN: If this appeal did not exist.

MR CARSON: Yes; and when I get to the end I am going to say, very substantially improved, but I do not want to anticipate my argument.

I say without hesitation that the law should permit no such fear to cast its shadow over the deliberations of the Board.

I want this Commission to appreciate that I am not so much concerned about the number of appeals there have been and the fact that very few appeals have been allowed; it is the fact that this possibility is hanging over the Board at all times, and unconsciously, as I say, there is a natural tendency to arrive at a decision that will not make it politically embarrassing for the tribunal that can vary or set aside their decision.

13. In the result -- that is, in the result of this

competitive rate thing -- the Board, by a majority judgment delivered by the Chief Commissioner ruled that the increase in competitive rates must be suspended and it was not until the delivery of the 21% judgment some seven months later that the railways were permitted to increase their competitive rates.

Now, there was a substantial loss in revenue as a result of what occurred there.

14. Another instance of the decision of the Board that, in my submission, was unconsciously influenced by public opinion occurred in connection with the matter of regional hearings.

15. In the course of the 21% case, counsel for the seven provincial governments urged the Board to hold regional hearings in each of their provinces in order that the citizens of each province should have the opportunity of presenting their views to the Board. The railways opposed this proposal on the ground that the application before the Board was one for a rate increase and should not be confused with a general freight rates investigation. The sole issue before the Board, in the railways' submission was what rate of increase should be allowed to meet the financial needs of the railways. The complaints of individual shippers as to particular rates or comparisons of rates could be of no assistance to the Board on that issue.

The argument on the question of regional hearings took place in Ottawa on April 24th and 25th, 1947 after the hearings in Ottawa had lasted some 48 days and will be found in Volumes 751 and 752, p. 4858 to p. 5020.

Mr. Frawley, on that argument, went the distance of contending that even if no one turned up in Edmonton to give evidence when the Board and all counsel attended there,

it made no difference. The people of Alberta should, he urged, have the opportunity of being heard, and to quote his words, "whether in the end they will be particularly helpful or not in determining the question is beside the point". (That will be found at p. 4876 of Vol. 751 of the 21% transcript).

The judgment of the Board will be found commencing at p. 5185 of Vol. 752. The effect of it was that the Board divided evenly on the question. The then Chief Commissioner, the Deputy Chief Commissioner and Mr. Commissioner McPherson felt it desirable to hold the regional hearings. The Assistant Chief Commissioner and Commissioners Stoneman and Stone were of the view that there was no need to hold sittings in the provincial capitals when the real issue was the revenue needs of the railways. This latter view expressed in 1947 turned out to be similar to that expressed in 1949 by Dearing and Owen at p. 374, to the effect that the intricate question of rate relationships should not be made part of a general increase case, but should be dealt with in subsequent hearings. The Board being evenly divided on the question of regional hearings, the Chief Commissioner, acting under Section 20 of the Railway Act, then cast the deciding vote in favour of regional hearings, and the Board, with the necessary staff, and the railways, with their necessary staffs, and counsel for the parties embarked on a tour of Canada that commenced on the 50th day of the hearings and occupied about seven weeks and an eighth week to receive similar evidence in Ottawa.

The Board listened with amazing patience to evidence directed to the intricate question as to whether rate differences constituted rate relationships and to the grievances---

THE CHAIRMAN: You are altering the language?

MR CARSON: Yes, I have altered that a little -- as to whether rate differences constituted rate relationships.

THE CHAIRMAN: The intricate question whether---

MR CARSON: Yes, as to whether rate differences constituted rate relationships and to the grievances and submissions of individual shippers, Boards of Trade and other organizations. Many of such witnesses no doubt assumed that their particular complaints could and would be taken care of in the decision to be given by the Board.

With all respect, however, the excursion was, in my submission, a complete waste of time and of no assistance whatever to the Board in the judgment it ultimately rendered.

Without taking the time to read it, I ask the Commission to examine the judgment of the Board in the 21% Case, from pages 42 to 45, which amply supports the submission I have made that that excursion was a waste of time. That is at pages 42 to 45 of the gray-covered book. I am not going to take time to read it now.

The case was decided solely on the basis of the financial needs of the railways and no effect whatever was given to the grievances and representations of the individual groups and persons heard in the provincial capitals. These grievances and representations were of course worthy of being listened to on the appropriate occasion -- that is to say, on applications to disallow particular rates, or in the course of a general freight rates investigation, or possibly to some extent in an enquiry of the nature now being conducted by this Commission, but they had no place in a pure revenue case.

Why was all this valuable time wasted? Certain members of the Board had hanging over them, unconsciously no doubt, the possibility of an appeal to the Cabinet and an attack upon the Board in the course of such an appeal. It would be politically difficult for the Cabinet to resist the palatable and popular but utterly irrelevant argument that a rate increase had been authorized without giving the people of Canada an opportunity to be heard. The uninformed public would never appreciate that the revenue issue could be and was being thoroughly and more than adequately fought out by competent provincial counsel and assisted by batteries of experienced chartered accountants right here in the City of Ottawa.

I now come to another subject that is pertinent to the matter of appeal, the delay in granting relief to Railways.

(Delay in granting relief to Railways)

16. The possibility of political intervention through the medium of Section 52(1) was, in my submission, a factor in causing substantial delay in the railways obtaining needed relief. Your Commission is now well aware of the fact that the first application for rate increase after the War was launched in October, 1946. The wage increase of 10¢ per hour was about to go into effect, retroactive to June 1, 1946, and it was estimated that this increase would add something over \$40,000,000 to the payroll of the Canadian railways. The hearings commenced before the Board on February 11, 1947, and lasted 150 days, ending on December 17, 1947. It was not until March 30, 1948, that the judgment was delivered authorizing the 21% increase, and it did not go into effect until April 8th of that year. The result of this interval was that the railways had borne the full

impact of that wage increase without any rate relief for a year and nine months, . at a cost of approximately \$70,000,000.

I am not suggesting that a case of that kind -- that is, a general revenue case -- would not necessarily occupy some time, but I do submit to this Commission that a grossly unreasonable amount of time was taken by a hearing that lasted 150 days. I should now like to explain why, in my submission, the time taken was far more than was reasonable. The railways were confronted with the vigorous opposition of seven provinces. I am not suggesting that opposition from those provinces was not proper, within reasonable limits.

THE CHAIRMAN: You are still on the argument, are you, that the possibility of this appeal had something to do with protracting proceedings?

MR. CARSON: Yes, my lord.

THE CHAIRMAN: Can you go on and give us an idea of how much they would have been reduced in time if there had been no possibility of appeal?

MR. CARSON : I cannot do it by slide rule.

THE CHAIRMAN: You would have had the seven provinces there in any event.

MR. CARSON: Yes. I am going to point this up. At the very outset of the 21% case (that is to say, on the 3rd of the 150 days) we pressed the Board to give some ruling or indication as to the scope of the inquiry, because we pointed out that unless the scope of the inquiry was defined at the outset there would be no limit to the extent of cross-examination and evidence that would ensue. (See Volume 739, page 555). That argument proceeded for several hours. The Board, however, never made any ruling in response to that lengthy argument.

We just went ahead.

THE CHAIRMAN: That is, they never fixed the scope of the inquiry.

MR. CARSON: No.

The result was that the Board, against the objection of the railways, permitted prolonged evidence and cross-examination in relation to the intricate question of rate relationships, -- perhaps I should say "rate comparisons" rather than "rate relationships" -- the grievances of individual shippers as to the existing rate structure and other matters which, in our submission, had no place in a financial case. And so the hearings proceeded with virtually no limitation on any one. This did not carry the approval of all members of the Board, as will be seen from the judgment of the Assistant Chief Commissioner delivered about $2\frac{1}{2}$ months later (namely, on April 29th, 1947) in his dissent from the ruling that regional hearings should be held, in Volume 752, at page 5191. He said he could not see (and I quote his words) "that questions of regional inequalities or discrimination should be intermingled with a straight financial question that exists from coast to coast." Further on the same page, he said:

"However, there are times, and I thought this was one of them, when the Board's experience and knowledge in these matters could be helpful to all parties in clearly defining -- or at least suggesting -- at the beginning of such a case as this, the scope of the application before it. In fact this question was clearly put to the Board at or about the commencement of those sittings." That is the third day I referred to when we raised the question.

"But it was not answered. And I think the consequence of the delay has been, quite inadvertently, not quite fair to the parties or to the Board.

"The Board has now been sitting on this case for some two and a half months. The respondents are most ably represented by eminent and experienced counsel who in turn are supported by an amplitude of experienced financial and accounting experts. I do not see for the purpose of solving the problem immediately before this Board what further analytical assistance we could expect to receive by going elsewhere at this time."

And on page 5193 he said:

"While pressure in all good faith has been put upon the Board for additional hearings throughout the country, considering the nature of the present application, I cannot conscientiously accede to it."

On the same occasion, Mr. Commissioner Stoneman made the following observations (at page 5194):

"Commissioner Stoneman: Mr. Chief Commissioner, I intend to say very little more than I said on January 9th. I think my views were made perfectly clear. I said then:

'I think the Board's position in this matter should be made perfectly clear:

- (1) by refusing to consider regional and territorial irregularities or discriminations and questions of rate relationships on this application;

(2) that, at the conclusion of this hearing, the Board is prepared to hear any application or complaint with respect to the reasonableness of any rates or alleged unjust discrimination.'

I have listened to the argument by counsel made only last Thursday and Friday, and with great respect to you, Mr. Chief Commissioner, I say that I have not changed my mind with regard to any advantage that may be gained by this Board in deciding this application by hearing outside of this city matters that I suggest must necessarily apply to regional and territorial matters."

A similar view was expressed by Mr. Commissioner Stone.

The learned Deputy Chief Commissioner, in concurring with the ruling of the Chief Commissioner that regional hearings should be held, said that "everyone is entitled to appear before us and expose his views." (See page 5194 of Volume 752 in 21% Case.)

I would not venture to dispute that proposition that at the proper time and on the proper occasion everyone is entitled to appear and expose his views in regard to such matters as rate comparisons, rate relationships, the rate structure, regional inequalities, unjust discrimination and kindred subjects. Those problems may be presented and considered on such occasions as a general freight rate enquiry or upon applications to suspend particular rates and, to some extent, before this Commission, but such problems cannot be properly considered or solved during the course of a proceeding that is primarily concerned with the financial needs of the railways.

The Commission will remember that in the result the Board was then evenly divided three and three, and the casting vote of the then Chief Commissioner resulted in regional hearings being held, which in themselves occupied some seven weeks, and an additional week in Ottawa. The Commission will please understand that in anything I have said I am not to be construed as offering any criticism whatever of the competence and good faith of the then learned Chief Commissioner. Indeed, in my submission, the judgment he delivered on 30th March, 1948, disclosed a most thorough and capable analysis of the rate application and his judgment is to be commended for the careful way in which he sought to deal with the case as a matter of principle.

There were findings with which we did not agree but it is only fair to say what I have said there.

My respectful criticism has been directed to showing that the then learned Chief Commissioner allowed far too much latitude in the course of the hearings and that in so doing he was unconsciously under the influence of the possibility of political intervention through the medium of Section 52(1), even though in the result of his judgment he displayed admirable courage.

17. The delay in the railways obtaining relief by way of rate increase did not end with the judgment of 30th March, 1948.

On 14th July, 1948, a wage dispute resulted in a settlement of a further wage increase of 17¢ per hour, that was made retroactive to March 1, 1948. As was established in evidence, that wage increase alone, for the first year it was in effect, was to add to the railway payroll of the Canadian Pacific the sum of \$26,700,000 (See transcript in 20% Case, Volume 807, page 576.)

In other words, the burden of this second large wage increase was actually upon the railways over a month before the coming into effect of the 21% increase. And your Commission will recall that the 21% increase was the result of the application launched back in October, 1946, for the purpose, among other things, of obtaining relief for the railways in respect of the 10¢ per hour increase which had in the fall of 1946 been made retroactive to June 1, 1946.

Following the settlement on 14th July, 1948, of the 17¢ per hour increase, the Railway Association on 27th July, 1948, launched the application for a 20% increase in freight rates.

I have prepared and would now like to put before the Board a short memorandum containing a list in chronological order showing the outstanding events that occurred in respect to that application, as well as the dates of outstanding events commencing with the application of October, 1942. It is as follows:

MEMORANDUM OF DATES

1946

October 9 - Railway Association launched application for 30% increase in freight rates (general wage increase to railway employees amounting to 10¢ per hour about to become effective retroactively to June 1, 1946. Estimated that such increase would add approximately \$40,300,000 per annum to railway operating payroll of all the companies affected.)

1947

February 11 - Opening of hearings before Board.

February 11)
to)
May 9) Hearings before Board in Ottawa.

May 22)
to)
July 10) Regional Hearings in
Saint John, N.B.
Halifax, N.S.
Charlottetown, P.E.I.
Regina, Sask.
Vancouver, B.C.
Edmonton, Alta.
Winnipeg, Man.
Toronto, Ont.
Montreal, P.Q.

July 14)
to)
August 14) Hearings in Ottawa

September 22)
to)
October 17) Hearings in Ottawa

November 10 }
to }
December 17 } Hearings in Ottawa

December 17 Judgment reserved after 150 days
consisting of 122 days of evidence
and 28 days of argument.

1948

March 30 Judgment delivered authorizing 21%
increase. Order No. 70425 - Formal
Order of the Board.

April 2 Wire, Premier of B.C. to Prime
Minister requesting suspension of
21% increase.

April 3 Wires, Premier Manitoba and Maritime
Board of Trade to Governor in
Council requesting suspension.

April 5 Tariffs filed effective April 8
increasing rates 21%

Wire, Premier Alberta to Prime
Minister requesting suspension.

Further wire, Maritime Board of Trade
to Governor in Council requesting
suspension.

April 7 Wire, Premier Saskatchewan to Prime
Minister requesting suspension.
P.C. 1486 declining to suspend 21% increase
P.C. 1487 directing Board to conduct
general investigation.

April 8 21% increase went into effect.

April 12 Announcement by Board of General
Freight Rate Investigation.

April 26 Provincial Premiers meet Federal
Cabinet and submit Brief.

July 14 Wage increase 17¢ an hour announced,
retroactive to March 1st, 1948.

July 20 Provincial Premiers again meet Federal
Cabinet in Ottawa and submit further
Brief and also lodge Petition of
Appeal.

July 27 Railway Association launched appli-
cation for 20% increase (15% interim)
and requested the Board to set appli-
cation down for hearing "at the earliest
possible date in September next."

September 9 C.P.R. received notice of motion of
provinces dated August, 1948, for
order staying all proceedings in 20%
application pending disposition of
appeal to Governor in Council.

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- September 21 - Hearing of motion of provinces to stay and application of railways for early date for hearing. Chief Commissioner stated that the Board's engagements would not permit it to fix a date for the hearing before end of year and fixed Tuesday, January 11th, to commence hearing.
- September 27 and 28 - Hearing of appeal before Governor in Council.
- October 12 - P.C. 4678 directing review in 21% Case.
- December 29 - P.C. 6033 appointing Royal Commission.

1949

- January 11 to February 24 } - Hearings before Board on review of 21% Case and on 20% application.
- March 28 to April 5 } - Continuation of above hearings.
- April 5 - Judgment reserved after 21 days of evidence and 7 days of argument.
- September 22 - Judgment delivered authorizing 8% interim increase.
- October 6 - Notice by Canadian Pacific of application to Board for leave to appeal to Supreme Court of Canada.
- October 11 - 8% interim increase went into effect.
- October 27 - Board granted leave to appeal.
- October 31 - Chief Justice of Canada made order that Case on Appeal be filed on or before November 21, 1949, Facts of the parties to be filed on or before November 30, 1949, and that appeal be set down for hearing on December 5, 1949.
- December 5, 6, 7 and 8 - Argument of Appeal before Supreme Court of Canada. When judgment reserved on December 8th, Chief Justice announced judgment would be delivered December 22nd.
- December 22 - Judgment of Supreme Court of Canada to effect that Board had failed to perform its duty under Railway Act in not finally determining 20% application.

December 23 - Upon application by Railway Association, Chief Commissioner fixed February 2nd for hearing of final determination, subject to representations of provinces to be heard on January 3rd, 1950.

1950

January 3 - Hearing before Board when February 2nd confirmed as date for hearing.

February 2, 3, 6 and 7 - Hearing before Board on application for final determination. Judgment reserved on February 7th.

March 1 - Board delivered judgment authorizing 16% increase in place of 8% interim increase.

March 10 - Notice by Railway Association of application to Board for Order changing, altering or varying Order dated March 1, 1950, by substituting 20% for 16%.

March 17 - Petition by Provinces to Governor in Council under Section 52 of Railway Act by way of appeal from 8% Order dated 20th September, 1949, and from 16% Order dated March 1, 1950.

March 23 - 16% increase went into effect.

April 17 - Hearing before Board of application by Railway Association for 20% in place of 16%.

My lord, this chronology speaks for itself, and I am not going to go over each date, but I want to call attention to some particular dates. I refer first to page 1, where the date of October 9, 1946, is mentioned when the first application was made. Then we come down to December 17 in 1947, when judgment was reserved after 150 days consisting of 122 days of evidence and 28 days of argument. Then I would call attention to the date of delivery of judgment, namely March 30, 1948. So you have a proceeding pending from October 9, 1946, to March 30, 1948; and it relates to a wage increase that came into effect on June 1, 1946.

Then I set out on the next page the date of the submission from the provincial premiers and the dates when they met the cabinet. Then I ask the Commission to note that on July 14, 1948, wage increase of 17¢ an hour announced, retroactive to March 1, 1948. Then on July 20 the provincial premiers are in Ottawa, again putting in a brief against the 21% award. On July 27 -- that is thirteen days after the wage settlement -- the Railway Association launched an application for 20% increase -- 15% interim -- and requested the Board to set application down for hearing "at the earliest possible date in September next." Then on September 9 we received a notice of motion by the provinces that was dated some blank date in August, 1948, for an order staying all proceedings in the 20% application pending disposition of appeal under Section 32(1) and that motion was heard on September 21. The Chief Commissioner stated that the Board's engagements would not permit it to fix a date for the hearing before the end of the year and fixed Tuesday, January 11, to commence the hearing. That is almost four months before the case is to be heard.

Then looking at page 3 we see the date when the hearing of the appeal was before the Governor in Council, and the dates of the orders in council. Then in 1949 we get started with our 20% case which is trying to catch up with the wage increase that went back to March 1, 1948. We give the dates when the hearings were held; and the Board will notice that on April 5, judgment was reserved after twenty-one days of evidence and seven days of argument. Then there is an interval of five months and we get judgment on September 22 authorizing the 8% interim increase. Then we had the proceedings that took us to the Supreme Court of Canada.

As a member of the bar one is always proud of the way in which our courts deal with matters expeditiously that are of an urgent nature. The Commission will notice that on October 27, the Board granted leave to appeal. We had to go to get leave to appeal from the Board. On October 31 the Chief Justice of Canada made an order that the case on appeal be filed on or before November 21, 1949, factums of the parties to be filed on or before November 30, 1949, and that the appeal be set down for hearing on December 5, 1949. The appeal was heard on December 5, 6, 7 and 8. At the conclusion of the argument on December 8, the Chief Justice announced that judgment would be delivered on December 22. I shall never forget his words when he said, "Perhaps we had better set an example." Then judgment was delivered on December 22 and we went over to the Chief Commissioner on December 23 and we were able to get February 2 fixed for that hearing.

Then on February 2, 3, 6 and 7 we had the hearings. The Board, which was composed now of Mr. Wardrope, Assistant Chief Commissioner, Commissioner Chase and

Commissioner McPherson, delivered their judgment on March 1 authorizing the 16% increase in place of the 8% interim increase. Then on March 10 we served our notice to vary that order by substituting 20% for 16% because of error, and the provinces came along on March 17 with a petition of appeal under Section 52(1) from the 8% order and from the 16% order. The 16% increase went into effect on March 23, and on April 17 we had our argument before the Board on the application to vary the judgment; and the judgment is not yet out.

I should now like to put before the Board by way of comparison a memorandum showing the time taken in respect of various rate applications that were made to the Interstate Commerce Commission.

THE CHAIRMAN: The word "Board" there should be Commission.

MR. CARSON: I should say before your Commission, my lord. I should like to put before your Commission, by way of comparison, a memorandum showing the times taken with respect to various applications that were made to the Interstate Commerce Commission, since 1946. This, by the way, is a memorandum that I put before the Supreme Court of Canada in argument. It is as follows:

RECENT DECISIONS OF INTERSTATE COMMERCE COMMISSION
UPON RATE APPLICATIONS OF UNITED STATES RAILROADS

EX PARTE NO. 162 - 264 I.C.C. 695; 266 I.C.C. 537

April 15, 1946 - Application filed for 25% increase,
to be effective May 15, 1946, pending
hearing.

April 26 - Case re interim increase assigned for
hearing.

May 6-18 - Hearing of evidence re interim increase.

- May 11 & 13 - Hearing of argument re interim increase.
- June 20 - Interim increase granted (Ex Parte 148 rates made effective and certain rates increased by an additional 5%) - 264 I.C.C. 695.
- July 22-Sept. 20- Regional hearings re permanent increase.
- Sept. 23-28 - Argument re permanent increase.
- Oct. 25 - Case submitted for decision.
- Dec. 5, 1946 - Permanent increase 20-25% granted, 266 I.C.C. 537.
- EX PARTE NO. 166 - 269 I.C.C. 33; 270 I.C.C. 81; 93: 403.
- July 3, 1947 - Application filed for 15 to 25% increase.
- July 23 - Application amended.
- Sept. 5 - Application further amended to 28-38%.
- Sept. 9 - Motion at opening of hearing for interim increase of 10%.
- Sept. 9-18 - Hearing of evidence.
- Sept. 18-19 - Hearing of argument.
- Oct. 6 - Interim increase of 10% granted, 269 I.C.C. 33.
- Nov. 3-Dec. 13 - Hearings, regional, etc.
- Dec. 15-20 - Argument.
- Dec. 29, 1947 - Additional 10% interim increase granted, 270 I.C.C. 81.
- April 13, 1948 - Interim increases 20-30% granted in lieu of those of Oct. 6 and Dec. 29, 1947. 270 I.C.C. 93.
- July 27, 1948 - Permanent increase granted, readjusting upwards and downwards the interim increases. 270 I.C.C. 403.
- EX PARTE NO. 168 - 272 I.C.C. 695; 276 I.C.C. 9.
- Oct. 1, 1948 - Application for increase of 8%
- Oct. 12 - Application amended to 13% with request for interim increase of 8%.
- Nov. 30-Dec. 7 - Hearing of evidence.
- Dec. 8-10 - Hearing of argument.
- Dec. 29, 1948 - Interim increase 4-6% granted. 272 I.C.C. 695.
- May 21, 1949 - Case for permanent increase submitted for decision.
- Aug. 2, 1949 - Permanent increase 8-10% granted. 276 I.C.C. 9.

I do not need to pause and give your Commission the references as to where these will be found, because I have given the I.C.C. report opposite each case.

To take Ex Parte No. 162, to begin with, their application was filed on April 15, 1946, and they assign a case for hearing with respect to an interim increase. They hear the evidence on May 6 to May 10. They hear argument on May 11 and 13, and that is on the interim increase. On June 20, the interim increase is granted. Then on July 22 to September 20 they have their regional hearings re permanent increase. Their argument on the permanent increase is heard from September 23 to September 28. On October 25, case submitted for decision and on December 5, 1946, permanent increase is granted of 20% to 25%. I ask the Board to note this fact. From the time of the original application to the time of the order granting the interim increase, 2 months and 5 days elapsed. From the time of the increase to the time of the permanent increase, with all the argument and evidence, 5 months and 15 days elapsed. So the total time from the original application to the granting of the permanent increase was 7 months and 20 days.

In Ex Parte No. 166, an application was filed on July 3, 1947. Certain amendments are made. On September 9 there is a motion for an interim increase of 10%. They heard evidence and argument that lasted only nine days. On October 6, within a few weeks -- about three weeks -- an interim increase of 10% is granted. Then they have hearings and argument, and an additional 10% interim increase is granted on December 29. Another interim increase is granted on April 13, and on July 27, 1948, a permanent increase goes into effect.

In that case, from the time of the original

application to the order granting the first interim increase there was a lapse of 3 months and 3 days. From the first interim increase to the second interim increase there was a lapse of 2 months and 23 days; and from the second interim increase to the third interim increase, 3 months and 15 days, and from the third interim increase to the permanent increase, 3 months and 14 days.

Then as to the last one, Ex Parte No. 168, an application was filed on October 1, 1948. There were certain amendments. The hearing of evidence and argument took about six actual days for the evidence and 3 days for the argument. On December 29 there is an interim increase. On August 2, 1949, a permanent increase. So that from the time of the original application to the interim increase there was a lapse of only 2 months and 28 days, and from the time of the interim increase to the final determination, 7 months and 4 days.

THE CHAIRMAN: We will adjourn now.

---The Commission adjourned at 1.00 p.m. to resume at 2.45 p.m.

Ottawa, Ontario,
Wednesday, May 17, 1950.

AFTERNOON SESSION

THE CHAIRMAN: Very well, Mr. Carson.

MR. CARSON: My lord, before adjournment I had gone over the memorandum showing the dates of events in Canada in respect of rate applications and when the orders were made, and also had gone over a memorandum with respect to the same matters in the case of the United States, showing that there was a considerable difference in the time lag that has occurred here as compared with the United States.

Then, turning to page 43 of my written argument:

By comparing what has happened in the United States with what has happened in Canada, is there any explanation for the difference in the time taken there compared with here? My submission is that the difference can be explained to a considerable extent by the fact that in Canada we have Section 52(1) permitting political interference with the Board's decisions, whereas in the United States the decisions of the Interstate Commerce Commission are not subject to any political appeal or interference. In that respect, and indeed so far as I am aware, in every respect, the Interstate Commerce Commission is entirely free from political interference.

Even the time taken by the Interstate Commerce Commission in disposing of general rate cases since 1946 has been the subject of critical comment.

The Commission will find, commencing on page 44, some extracts from Dearing and Owen, and that extends to the bottom of page 46. In that part of their book they take the dates that I have already given in the memorandum and they deal with the effect money-wise of those

time lags.

(Read from Dearing and Owen, top of p.280 to top of p.286, as follows:)

"In order to compensate for known and anticipated increases in labor and materials costs, the railroads filed on April 15, 1946, a petition for an increase of approximately 22 per cent in the general level of freight rates. After so-called 'emergency hearings', the Commission on June 20 granted an interim increase of approximately 6 per cent to become effective July 1, 1946. Extensive hearings and arguments on the permanent aspect of the case were held regionally and in Washington from July 22 to September 26, 1946. Finally, on December 5, 1946, the Commission granted an additional 11.5 per cent increase in the general level of freight rates to become effective January 1, 1947.

Thus a full year had elapsed between the time the railroads felt the impact of increased costs and the date on which they were permitted by the I.C.C. to increase freight rates by anything like a corresponding amount. It is difficult to find an adequate explanation for this extreme time lag. For the controlling facts were so strikingly clear that any prolonged and formal hearing designed to 'inform the Commission as to the facts' was not only unnecessary but was destined to produce delay.

What did the Commission learn from the July-September hearings that was not or could not have been determined from the May hearings? In short, what facts or circumstances justified a 17 per cent increase in freight rates effective January 1, 1947, as against a 6 per cent increase effective July 1, 1946? The two major elements of cost, labor and

materials, that controlled the December decision were known as firmly in June as in December. The only major speculative element was the anticipated level of traffic. The carriers' traffic estimate for the last half of 1946 indicated that the railroads as a whole, and particularly certain carriers, could escape serious financial difficulties only by an immediate and substantial increase in the general level of their rates.

In fact the Commission's delay in deciding these cases obviously contributed to the financial deterioration of the regulated carriers. Between January 1, 1946, and January 1, 1947, the working capital of Class I railroads was reduced from approximately 1,643 million dollars to 1,257 million dollars, or 23.5 per cent. A substantial amount of this reduction was occasioned by the extreme distortion in cost-price relations brought about by the Commission's unhurried handling of the rate case. And despite near-capacity operations, Class I carriers as a whole realized a return of only 2.75 per cent on their investment. This compared with a rate of 2.23 per cent for the 1930-34 period which includes three of the most disastrous operating years in modern railroad history.

Moreover, this average figure does not reveal the true impact of the 1946 cost-price relations on individual railroads, for in that year, 29 of the 131 Class I railroads failed to earn fixed charges (suffered a deficit of net income). And, even though total railroad capitalization had been scaled down extensively as a result of financial reorganization, almost one-half (45 per cent) of

the total amount of stock outstanding in 1946 failed to yield any dividends. Although of less serious immediate consequence, the 1946 difficulties of the railroads in attaining rate adjustments were experienced again in 1947.

1947 Increased Freight Rates (Ex Parte 166). Against the background of unsatisfactory 1946 financial results and rapidly increasing operating costs during the first half of 1947, the carriers filed another petition for increased freight rates on July 3, 1947. The petition was set for hearing by the I.C.C. for September 9, 1947. In the meantime, sharp increases had occurred in the cost of major railroad operating supplies. Also, an arbitration board had awarded the non-operating railroad employees a substantial increase in wage rates effective September 1, 1947.

(Here a graph is inserted showing Rate of Return, National Income, Traffic Volume and Capital Expenditures, 1920-48.)

An amended railroad petition called for an increase in the general level of freight charges amounting to approximately 27 per cent. Again the carriers as a whole were faced with an emergency situation, one requiring a prompt restoration of balance between income and outgo. Consequently, their spokesmen concentrated on obtaining promptly an interim increase of 10 per cent. The initial hearings before the I.C.C. were devoted largely to argument on this point. This was clearly an expedient to avoid repetition of the 1946 experience -- not an admission that the requested 27 per cent increase was a mere bargaining figure. Carrier witnesses contended that even though the interim

increase of 10 per cent were granted by the Commission and made effective September 15, 1947 (six days after opening of the hearing), the amount of revenue produced would compensate the carriers only for added pay-roll and material costs incurred after July 3, 1947. In short, even with the interim increase, the financial position of the carriers at the end of 1947 would be the same as it would have been had the wage and cost levels of July 3, 1946, prevailed during the remainder of the year.

The interim decision of the Commission granting the carriers an increase of approximately 8.9 per cent was made October 6, effective October 13. After further extensive hearing and argument, the Commission on December 29, 1947, issued a second interim report modifying the earlier interim order by authorizing a general increase of 20 per cent in the basic rates, effective January 5, 1948. And in a supplemental report adopted April 13, 1948, the Commission authorized general increases in the basic rates of 30 per cent within Eastern Territory; 25 per cent within Southern Territory and from, to, and within Zone 1 of Western Trunk-Line Territory, and also inter-territorially, and 20 per cent within the remainder of Western Territory, subject to stated limitations as maxima. These increases superseded the two previous interim authorizations and brought the total increase in basic freight rates authorized by the Commission on the basis of Ex Parte 166 proceedings up to approximately the level originally requested by the carriers in the supplemental and amended petition of September 5, 1947.

The fact remains that the relief requested on

the basis of September 1947 labor and operating costs was not realized by the carriers until May 1, 1948 -- a lag of about eight months."

Now, if you will compare that with Canada, the 17 cents wage award became effective 1st March, 1948, and on May 17, 1950, we are still trying to get a final determination of the 20 per cent application as a result of the application we argued on the 17th of April.

"The 'final' report on Ex Parte 166 was not issued until July 27, 1948 -- or almost eleven months after the original petition was filed. Although interim relief of less than 10 per cent was effective during the last two and one-half months of 1947, the financial results for the entire year 1947 were only slightly better than 1946. The average rate of return increased from 2.75 per cent to 3.41 per cent. Again the average figure obscures the plight of individual companies. Approximately the same number of carriers (33 in 1947 as compared with 26 in 1946) failed to make fixed charges and 38 of the Class I carriers earned less than 2 per cent on their investment.

A similar pattern of lag between rising costs and rate adjustments occurred during 1948. Negotiations for increased rates of pay, changes in the work week and working conditions resulted in additions to the railroad labor costs at an estimated rate of 650.6 million dollars annually.

In order to compensate for these added labor and other operating costs, the carriers filed with the Interstate Commerce Commission on October 1, 1948, a petition for an 8 per cent increase in the general level of freight rates. On October 12, this petition

was amended, requesting a 13 per cent permanent increase with an 8 per cent interim adjustment. The interim aspect of this case was decided by the Commission on December 29, 1948, with the granting of a 4 to 6 per cent increase. At this date (July 1949) the requested 13 per cent permanent increase has not been decided by the Commission.

Although the latest rate increases were not reflected in 1948 operations, the apparent financial position of the Class I carriers for that year showed some improvement over 1947. The rate of return on net investment increased to 4.38 per cent (based on investment at beginning of 1948). And only 19 roads reported net deficits as against 33 in 1947, while aggregate net income rose from 490.4 million dollars to 700 millions. However, on the basis of rates now in effect (May 1949) and making allowance for increased labor costs, it is estimated that net income will drop to 497 million dollars in 1949 and that the rate of return will fall to 3.1 per cent.

We must therefore conclude from this analysis of recent general rate cases that regulatory delays are responsible in no small measure for the relatively poor financial record made by the railroads in the immediate postwar period. This situation cannot be viewed merely as an adverse development for railroad security holders who are experiencing only moderate returns in the midst of unprecedented levels of general economic activity. On the contrary, failure of the railroad industry to participate in the generally high level of postwar industrial profits raises doubts as to the long-run financial prospects of the carriers."

But the Commission will note that the time lag between the impact of increased costs and the granting of relief by the Interstate Commerce Commission is nothing compared with the time lag that has occurred in Canada between the impact of increased costs and the granting of relief by the Board of Transport Commissioners.

THE CHAIRMAN: Mr. Carson, you gave us two dates there, and you were comparing them with the American corresponding dates.

MR. CARSON: Yes.

THE CHAIRMAN: The date when you began these proceedings which are not yet over, what was the date of the beginning?

MR. CARSON: The proceedings were launched on July 27, 1948. The impact of the costs had its beginning on March 1, 1948, because you will remember, my lord, that the 17 cents wage award was settled on the 14th of July but made retroactive to the 1st of March, 1948.

Now, Dearing and Owen point to a lag of eight months between the time when the operating costs became effective until the relief was granted, and I am pointing out that over two years have elapsed here and we are still not finally closed up on that application.

Now, I want to leave with the Commission, but I do not want to take any time to comment on it, an exhibit that was filed on the recent application of April 17, showing what the effect has been upon the Canadian Pacific money-wise. That exhibit has an explanatory note attached to each statement, to which I could not usefully add, and I am sure the Commission will be able to follow it without any difficulty. Perhaps it should have an exhibit number.

MR. COVERT: I think perhaps it would be better.

It will be No. 285.

MR. CARSON: Exhibit 285 would be described, "Canadian Pacific Railway Company, Deficiency in Railway Operating Revenues Year 1949." That is the first statement, and there are other statements attached.

EXHIBIT No. 285: Statements -- "Canadian Pacific Railway Company, Deficiency in Railway Operating Revenues Year 1949," and other statements.

MR. CARSON: That was Exhibit 49-211 before the Board of Transport Commissioners. I would ask the Commission particularly to look at statement "E", which I am not going to comment on other than to draw attention to the end figures. Statement "E" is the last sheet of the exhibit. That is a comparative statement of the results of the Canadian Pacific for the years 1947, 1948 and 1949 on the basis of the "Respondents' Interpretation of Revised Formula", as adopted by the Board, per page 14 of judgment of February 28, 1950.

Now, my lord, that is the formula as we now have it settled by the Board, and on the basis of that formula and on the basis of the total revenue deficiency, at least on the basis of the revenue deficiency worked out according to that formula, that should be met by an increase in freight rates, you will see that in 1947 the Canadian Pacific had a deficiency of over \$20 million, in 1948 a deficiency, giving credit for the full 21 per cent, of over \$30 million, and in 1949 a deficiency of almost \$30 million, so that there is about \$80 million that is now water over the dam that can never be recouped by rate increases.

20. In the course of Professor Locklin's cross-examination by Mr. Evans, the question as to the wisdom of the executive arm of government having the power to

override rate decisions of the regulatory tribunal was discussed.

Then I read, if I may, a short passage from that cross-examination, in Volume 62, at page 13106, where at the bottom of the page Mr. Evans put the question:

"And I take your answer to mean that while you agree with me that while you agree with me that the legislative branch must always be free, yet it would be a bad thing for the executive branch to intervene in the findings and decisions of the regulatory tribunal which has the power of regulating railways and their rates.

A. That would be my position with my background of American Government.

Q. I am only asking you as a matter of principle. I do not want to involve you nationally, and I do not want for us to get on the basis where anybody may think that you would speak one way in one country and another way in another country. But as a matter of principle, is it not a bad thing to have executive interference, that is Government executive interference, with tribunals which have the power of regulation over railways and their rates?

A. Yes, I think so, if you are speaking in terms of what we ordinarily think of, in terms of regulation, not in terms of promotional policy, or things of that sort with which our regulatory bodies do not have very much to do.

Q. If the railways apply for an increase in their rates, and the Board has heard the evidence and reached a decision, do you not agree with me

that would be wrong to have that decision overridden by the executive arm of Government?

A. I think so, yes.

Q. And is it not your view that one of the prime merits of the regulation of utility by a commission or a board is that the commission should be protected from this kind of pressure, and should be free to make decisions in these controversial matters in a semi-judicial atmosphere, and in a completely impartial atmosphere?

A. Yes. May I interrupt you?

Q. Yes.

A. I would not like to be put on record here as passing judgment on a system that you may have in Canada."

THE CHAIRMAN: I notice there that Professor Locklin points out that he has a background of the American system of government.

MR. CARSON: Yes.

THE CHAIRMAN: You must remember the great difference there is between here and there.

MR. CARSON: I do.

THE CHAIRMAN: They have, you may say, no government in the sense that we have one.

MR. CARSON: Quite so.

THE CHAIRMAN: I mean, just bear that in mind.

MR. CARSON: I do, my lord. All I am saying is that in the United States there is no appeal from their regulatory Commission to any tribunal that has any political --

THE CHAIRMAN: Yes, I know. What they call the executive in the United States is something outside of the legislative part entirely, whereas with us there

is this combination. What we call the executive are ministers responsible to Parliament all the time, so there is a blend of the two, the legislative and the executive, here, which does not exist in the United States, and unless we bear that in mind we are liable to arrive at false conclusions.

MR. CARSON: Well, let me put it in this way, that under 52(1) the appeal is to the people; they are elected by the people. Now, in the United States there is no appeal to anyone elected by the people.

THE CHAIRMAN: Yes, but I do not see how they could get such a thing as what we call a committee of the Cabinet together in the United States, because you know how it is.

MR. CARSON: Well, they could have a committee of the House of Representatives.

THE CHAIRMAN: Of the House, yes; that is the legislative body.

MR. CARSON: Yes, the committee -- if they had a committee.

THE CHAIRMAN: But that committee reports back to the House.

MR. CARSON: Quite so. The Cabinet here --

THE CHAIRMAN: However, I think you see as well as I do the difference.

MR. CARSON: Oh, I do.

THE CHAIRMAN: It must be well borne in mind.

MR. CARSON: Yes, but I think for the purpose of my point it comes down to this: there is no appeal there to anyone whose --

THE CHAIRMAN: Yes, that is your point.

MR. CARSON: -- position depends on election. Now I would like to read, if I may --

THE CHAIRMAN: There is no appeal there, except of course that Congress is always there observant of what is going on and capable of amending the legislation from time to time.

MR. CARSON: I am sure your lordship would not interpret my argument as suggesting that Parliament would not continue to function.

THE CHAIRMAN: I mean going so far as declaring policies.

MR. CARSON: Quite so. Professor Locklin's views are also to be found in his book entitled "Economics of Transportation", published in 1949, under the head "Dangers and Weaknesses of Commission Regulation", commencing at p. 299.

I would like to read a short passage commencing on p. 299 and continuing to the bottom of p. 300;

DANGERS AND WEAKNESSES OF COMMISSION REGULATION

"Although regulation by administrative bodies or commissions is essential to successful regulation of railroads, there are certain dangers and weaknesses in the system.

The danger of arbitrariness in action and assumption of unwarranted power inheres in all attempts at control through administrative bodies to whom broad powers of regulation are delegated. It is for the purpose of warding off this danger that the right of judicial review is insisted upon. This danger has been effectively eliminated in our federal regulatory system.

A second danger lies in weakness of personnel. The task of regulation is at best a difficult one, and it is essential that commissions consist of able men. Our State commissions have sometimes been criticised for failure in this respect although some of them have consisted of men of high caliber. In general, a high standard of ability has been maintained in appointments to the Interstate Commerce Commission. From the very beginning the Commission has had some members of outstanding ability and reputation who have been an honor to the public service and who have played an important part in making regulation a success.

A third danger in regulation by commissions is political interference. A commission is, and must remain, an impartial body. Commissioner Eastman has stated emphatically that commissions 'must not be under the domination or influence of either the President or Congress or of anything else than their own independent judgment ~~x~~ of the facts and the law.' The high esteem which has attached to the Interstate Commerce Commission

"is due, in large measure, to its independence and freedom from political influences. In the words of a former member of the Commission, that body has 'performed its duties in "accord with its conscientious convictions of what was the right thing to do, and has not been swayed by popular clamor, by any political influence . . . and if the time ever comes when the Interstate Commerce Commission has to consider whether or not a thing is going to be popular, and whether or not it is going to be attacked by one political party or another, its usefulness will be very seriously impaired . . .' The reason for making the Interstate Commerce Commission an independent body, not subordinate to any of the departments of the executive branch of the Government, was to keep it free from political control and the influence of changing administrations. For the most part the executive branch of the Government has not attempted to interfere with the Commission or its decisions. President Wilson is reported to have said, at a time when important controversies were before the Commission which affected the country as a whole, that he would as soon think of proffering suggestions to the Supreme Court upon a matter before it as to suggest how the Commission should decide a case. Later Presidents have not always been as particular, and have at times made their wishes known to the Commission, or have made public statements which might be interpreted as prejudging matters before the Commission. From time to time proposals are advanced for bringing regulatory commissions under the control of the Executive. Political influences frequently appear in the appointment and confirmation of commissioners. One of the most discouraging incidents of this sort occurred in 1928 when the Senate refused to confirm the reappointment of Commissioner Esch

apparently because of his vote in the famous Lake
Cargo Coal Case, a very difficult and bitterly contested
case, in which opposing sectional interests were involved.

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21. The provision for appeal to the Governor in Council under Section 52(1) may have been a proper precaution during the transition period following the substitution of the Board for the Railway Committee of the Privy Council as the regulatory tribunal. But in my submission such a provision is now antiquated and wholly unnecessary.

I do not know that I made it clear this morning, in answer to a question your lordship put to me, that there would always be public clamour, but I am confident that if the Government could respond to public clamour by saying, "We have nothing more to do with this any more, it is entirely left to an independent, impartial body," that public clamour in the course of time would subside, provided, of course, you had an independent, impartial body that commanded the respect of the people who appeared before it, all people who appeared before it.

22. It does not seem to be the policy today of either the Federal Government or of certain of the Provincial Governments to have tribunals entrusted with rate regulation subject to an overriding power of the executive government.

23. For example, the Aeronautics Act of Canada, R.S.C. 1927, Ch. 3, Section 11, as amended, provides that the Air Transport Board may, subject to the approval of the Governor in Council, make regulations

"(g) respecting traffic, tolls and tariffs and providing for the disallowance or suspension of any tariff by the Board; the substitution by the licensee of a tariff satisfactory to the Board or the prescription by the Board of other tolls in lieu of the tolls so disallowed."

THE CHAIRMAN: But you say all that is subject

to the approval of the Governor in Council.

MR. CARSON: Well, the Board, subject to the approval, makes the regulations, but then once the regulations go in may we see what happens.

THE CHAIRMAN: Pardon me a moment. The regulations, I suppose, are recommended by the Board and then made into an Order in Council. That is the usual procedure.

MR. CARSON: I think that is the procedure there, yes.

Provision is made in the Act for two types of appeal, one to the Minister and the other to the Supreme Court of Canada.

The appeal to the Minister is limited to questions respecting "licences" and may be made where the Board suspends, cancels or amends or refuses to issue a licence. (See Section 12(8)).

THE CHAIRMAN: That appears to be an Act, then, administered by a Minister, with the Board there, but --

MR. CARSON: There is the Air Transport Board --

THE CHAIRMAN: Pardon me. The beginning of the Act no doubt specifies who is who. Is there an interpretation clause there?

MR. CARSON: I have not actually got the section.

THE CHAIRMAN: Oh, I thought you had it. I am sorry; I did not mean to delay you.

MR. CARSON: Not at all, my lord. I have it now; this is the Act. It sets out the duties of the Minister:

"It shall be the duty of the Minister, -

(a) to supervise matters connected with aeronautics."

That is a very general provision that is found in many

of these statutes.

THE CHAIRMAN: Pardon me. You are not arguing, are you, that the Railway Act should be handled in the same way?

MR. CARSON: Oh, no.

THE CHAIRMAN: Quite the contrary.

MR. CARSON: I am only saying that here is a much later statute that indicates that policy has changed so far as permitting appeals in rate matters is concerned. It is the rate side of it with which I am concerned. And where they do provide an appeal, having set up this Aeronautics Board, the appeal to the Minister is a limited one and it is only in respect to the matter of licences. That is, the Minister might say, "Now, we should not have an air line licence running from A to B, because of certain reasons."

THE CHAIRMAN: Now, tell me, what are the general functions of the Board? Does it fix any rates?

MR. CARSON: Oh, yes.

THE CHAIRMAN: That affect the public?

MR. CARSON: Yes. I am just going to refer to that. It is in my memorandum here on page 48:

The appeal to the Supreme Court of Canada, however, is a general right to appeal "upon a question of jurisdiction or a question of law or both". (See Section 18(1)).

Section 9(3) of the Board's regulations sets out in some detail the duties of the carrier respecting tariffs and tolls, the principles upon which tolls are to be determined, and steps that may be taken by the Board in connection therewith. Briefly, the carrier is obliged to file with the Board in such form and containing such information as the Board may direct,

tariffs showing its tolls, terms and conditions of carriage, classifications, rules, regulations, etc. The tariff, or any portion thereof, may be disallowed if the Board considers it in any way unjust, unreasonable or contrary to any of the Board's regulations or directions.

THE CHAIRMAN: When the Board takes an action of that sort, is that one of the matters that is subject to the approval of the Governor in Council?

MR. CARSON: I would say not, my lord.

THE CHAIRMAN: I have not the Act; I do not know.

MR. CARSON: It is the Board that prescribes the tariffs and the tolls, it is the Board that has the jurisdiction to suspend, change, and so on, but once they have made that decision that is the end of it. That is the only point I am making out of that legislation so far as it compares with the Railway Act.

THE CHAIRMAN: I would like to know just what form their decision takes. We can find that out later on; do not delay the presentation of your argument.

MR. CARSON: I am told that they carry on very much along the same lines as the Board of Transport Commissioners so far as fixing tolls in respect of air transport is concerned. They have hearings and give notices and people come and make their submissions. But the only point I am making is that once they have done that, the present governmental policy, that goes back at least to 1919, I think, when the Act was first introduced, has been to leave those decisions free of any such provision as we have in 52(1).

THE CHAIRMAN: Yes, but then you must take the whole Act, you see. I am not so sure that you would in the final result welcome an Act which would set up a board all of whose regulations have to be approved of by

the Governor in Council and as to which a Minister was there to direct them. I doubt very much whether you would approve of that.

MR. CARSON: I would not argue that, and I am not suggesting that that particular type of legislation is desirable in all its aspects so far as railways are concerned. I am only suggesting the one point, and I do not want to overstate it.

THE CHAIRMAN: Pardon me. I am sorry to interrupt you, but right here you yourself give this, for example, the Aeronautics Act of Canada, and so on -- provided that the Air Transport Board may, subject to the approval of the Governor in Council, make regulations respecting traffic, tolls and tariffs.

MR. CARSON: Yes.

THE CHAIRMAN: Right there, you see.

MR. CARSON: They make the regulations.

THE CHAIRMAN: The tariffs are set subject to the approval of the Governor in Council.

MR. CARSON: Yes, my lord, but under that they do not, as I understand it, have their tolls approved by the Governor in Council at all. Under that section they make the regulation that provides the machinery for determining tolls, because your lordship will see what I have said further on on page 48 --

THE CHAIRMAN: Pardon me a minute. Providing for the disallowance or suspension of any tariff by the Board -- you see, all those things must be done with the approval of the Governor.

MR. CARSON: No. If I may say so, the important word is that subject to the approval of the Governor in Council they make regulations respecting certain things,

that is, respecting the suspension of a tariff, but then when you come to Section 9(3) of the Act --

THE CHAIRMAN: All I know about this Act is what I find here set out by yourself in the argument.

MR. CARSON: Well, I want to get credit for what I have further down:

Section 9(3) of the Board's regulations sets out in some detail the duties of the carrier respecting tariffs and tolls, --

THE CHAIRMAN: Now, those regulations, of course, are approved by the Governor.

MR. CARSON: Quite so. "-- the principles upon which tolls are to be determined, --" that is another thing that would be subject to the approval -- "and steps that may be taken by the Board in connection therewith." I am trying to summarize what those regulations prescribe.

Briefly, the carrier is obliged to file with the Board in such form and containing such information as the Board may direct, tariffs showing its tolls, terms and conditions of carriage, classifications, rules, regulations, etc. The tariff, or any portion thereof, -- the regulations say this -- may be disallowed if the Board considers it in any way unjust, unreasonable or contrary to any of the Board's regulations or directions.

But the point I am suggesting is that they have under this section, or rather under Section 11(g), the power to make these regulations as to how these things are to be done, but once the Board, moving within the ambit of the prescribed regulations procedurally, fixes the tolls and tariffs or disallows them or suspends them, or whatever they do, there is no appeal from that and there is no control over that by the Governor in Council at all. The Act says, Parliament says, "You, the Board

that we are setting up, may, subject to the approval of the Governor in Council, work out your regulations as to how you are going to operate, but, having worked out your regulations as to how you are going to operate procedurally and so on, you are the tribunal that is to fix the tolls and you are the tribunal that is to decide when you suspend them or change them," but there is no provision for any appeal of a decision so made by that Aeronautics Board.

THE CHAIRMAN: Who are the bodies who appear before this Board?

MR. CARSON: Well, I suppose many of these air line companies, and perhaps shippers who have a movement of traffic by air, probably boards of trade. I must say I am speculating a bit; I do not know just how they would appear. But the same kind of people have a forum there as those who are concerned in railway rates have a forum in the Board of **Transport Commissioners**.

THE CHAIRMAN: Well, by the little I am able to see of the Act here, I can warn you that the Board is pretty closely allied to the Government.

MR. CARSON: Well, my lord, it may be too closely allied to the Government, then, depending upon the interpretation that is put upon it, but I thought one thing was clear from that statute, and that was the only point I was seeking to make, that, having fixed the tolls, that is something that is left with the Board, although the regulations might be changed so that the procedure would be different or something of that kind.

Then I go on to the next paragraph, referring to that Act.

But Parliament has not thought it necessary to provide for any appeal in respect of any tariffs or tolls to the Governor in Council. This affords some indication

that in the course of time the view of parliament has developed to the point where it is not thought necessary or advisable to permit a rate-making tribunal to be overridden by the executive arm of government.

Now, my lord, may I just refer shortly to what has been done in certain of the provinces. I was particularly interested to see what the policy of Manitoba was, since that is the province that has taken such a strong position as to expanding the powers under 52(1). Out in Manitoba they have the Highway Traffic Act, which was enacted in 1930 and for the first time created an administrative body known as the Motor Carriers Board. That Board was empowered to exercise a general supervision over motor carriers and operators of public service vehicles and commercial trucks within the province. There is a board there that has power under Section 130 -- perhaps I should give your lordships a reference to the Act; it is in the Revised Statutes of Manitoba, 1940, Chapter 93. I would be glad to leave with the Commission a very convenient pamphlet copy that has the amendments down to 1949.

May I just say that that Board is empowered to fix the maximum and minimum tolls, fares or charges to be made by motor carriers for gain or compensation, and to fix the tolls which carriers in various classes may lawfully charge. That is under Section 130.

And under section 136:

"No tolls shall be charged until a tariff of tolls has been filed with and approved by the Board"

Then the Board has the power to revise the tariffs and so on. Now then, in 1936 provisions for repeal were added to that legislation, and they will now be found in Section 132. I think that is in the pamphlet your lordship has.

"An appeal shall lie to the Courts of Appeal from any final order or decision of the Board as constituted under this Act upon any question involving the jurisdiction of the Board or upon any point of law, and the provisions of section 57 of

'The Municipal and Public Utility Board Act' shall ^{that is} mutatis mutandis apply to any appeal/taken"

So that one has to go to the Municipal and Utility Board Act to find out the provisions about appeals there. Under that Act, Section 57:

"An appeal shall lie from any final order or decision of the Board to the Courts of Appeal upon (a) any question involving the jurisdiction of the Board; or (b) any point of law; or (c) any facts expressly found by the Board relating to a matter arising under Part V"

Then sub-section (2):

"The appeal shall be taken (that is, the appeal to the Courts of Appeal) only by leave to appeal obtained from a judge of the Court of Appeal within one month after the making of the order"

I ask your lordship to have that in mind when I come to the other point about having to get leave of appeal on a question of law from the Board itself.



Then they go on with the procedure, and I must say as I read this section I thought: "Well, some one took the Railway Act, Section 52 to find a precedent" because when you come to sub-section (5) of this very section --

THE CHAIRMAN: You are in the Municipal?

MR. CARSON: I am in the Municipal and Public Utility Board Act.

THE CHAIRMAN: Yes, all right.

MR. CARSON: Which is the one which *mutatis mutandis* deals with the appeals, and this language is very striking:

"(5) On the hearing of the appeal the court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary for determining the question, when it is one of jurisdiction or law, as the case may be, and shall certify its opinion to the Board and the Board shall thereupon make an order in accordance with that opinion"

That is almost word for word in the Railway Act. The next one is the same:

"(6) The Board shall be entitled to be heard by counsel or otherwise, upon the argument of any appeal"

Again that is the same as ^{the} sub-section of 52:

"(7) The Courts of Appeal shall have powers to fix the costs and fees to be taxed, allowed and paid upon any appeal...."

I won't take the time to read it all, but almost sub-section for sub-section that language is identical with section 52, except there is no 52(1).

Now then, I looked at Saskatchewan, and I found that in 1945 the Saskatchewan Legislature passed the Vehicles Act which created a Board. That is in the Statutes

of Saskatchewan 1945, chapter 98. I have obtained a copy that I will be glad to leave for the Commission, of that legislation, and that Board is composed of five members appointed by the Lieutenant Governor in Council. It was at one time known as the Public Utility Board, having first been established in 1932. That Board has power to make regulations subject to the approval of the Lieutenant Governor in Council and publication in the Gazette, governing certain things including the nature of goods carried, maintenance of depots, and so on.

Then under Section 22 and Section 176 taken together, the Board has the power to make regulations or orders governing,

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tolls, express or freight rates, that holders of public service vehicle certificates shall charge such tolls and rates as are from time to time prescribed by the Board and they cannot be altered save with the consent of the Board. Then turning to Section 23 - -

THE CHAIRMAN: What was the first Section you just read, 26, was it?

MR. CARSON: There is a group of Sections, 12 to 15.

THE CHAIRMAN: The one you have just read about fixing tolls.

MR. CARSON: Oh, yes, that is Sections 22 and 176 taken together, and then I am coming to Section 23. Then on the subject of appeals, they are dealt with in Section 23:-

"The board's decision in all matters shall be final, but if new evidence is submitted to it within thirty days of its decision, the board may rehear the case or may review, rescind, change, alter or vary any decision or order made by it".

There does not appear to be any statutory provision in that Act which would allow an appeal from the Board's decision to any higher tribunal, not even to the courts so far as I can find.

COMMISSIONER INMIS: In both Saskatchewan and Manitoba is there any reference to Government-owned enterprises? Are they affected by this Act?

MR. CARSON: I don't know what the situation would be in Saskatchewan today, whether there are Government owned enterprises. In fact, I don't know if the

Government is in the trucking business out there. Somebody may have told the Commission about it. I have put in the Act as it is, not with the amendments down to date.

MR. MacPHERSON: I think they do come under the Act. For instance, in Saskatchewan there is a Crown Corporation known as the Saskatchewan Transportation Company, and that comes under the Act, subject to regulation.

COMMISSIONER INNIS: In the case of a deficit, does that come to Parliament or - -

MR. MacPHERSON: It goes to Parliament, not dealt with by the Highway Traffic Board.

MR. CARSON: No, but the Highway Traffic Board, apparently independent of any appeal, does prescribe the charges that are made for the carriage of traffic.

THE CHAIRMAN: Are charges prescribed in Manitoba also?

MR. CARSON: Yes, the Board there has power as well.

25. Thus it will be seen that Manitoba, which is pressing not only for the retention of the right of appeal to the Governor in Council, but indeed for an extension of the powers of the Governor in Council, has taken an entirely different view with respect to a regulatory tribunal constituted under its own legislation.

Likewise the Province of Saskatchewan has apparently considered it wise to leave the rate-making jurisdiction of the regulatory tribunals to which I have referred free and unfettered from any political intervention through the medium of an appeal in respect to rates.

In concluding my argument on Section 52(1), I put it to your Commission with all the force I can that a sound economic policy for Canada requires that the fixing of rates for national transportation should be left entirely to the Board of Transport Commissioners without the power of political interference by the executive arm of government, and to that end that Section 52(1) should be wholly repealed. I submit with confidence to your Commission that if Section 52(1) is repealed, the Board of Transport Commissioners will grow in stature, independence and courage and in the soundness of its administration.

COMMISSIONER ANGUS: Mr. Carson, if Section 52(1) were repealed, would you expect the Act to lay down some principles for the guidance of the Board in matters of policy from which appeal could be taken as a matter of law?

MR. CARSON: No, my lord, our view is that it is not necessary to have any such amendment at all, that the Board has a proper jurisdiction within the language of the Act as it now is, just and reasonable rates, and there has been no difficulty about that until we have had these events that I have been reviewing.

COMMISSIONER ANGUS: Assuming that Parliament were of the opinion that special consideration should be given to primary products moving in bulk, something of that sort, would there be any way in which that opinion would be brought to the notice of the Board or communicated to it for its guidance?

MR. CARSON: Well, of course, if something is put in the Statute and becomes law, in my view there is no other course for the Board to take but to recognize - -

COMMISSIONER ANGUS: My question really was,

would you expect the Statute to contain provisions of that sort which are not necessary provisions if there is this right of appeal?

MR. CARSON: My lord, I think they are bad, but Mr. Evans is dealing with that subject quite extensively.

THE CHAIRMAN: Then will Mr. Evans answer this question. Section 325(5) talks about the necessity of rates being just and reasonable.

MR. CARSON: Yes.

THE CHAIRMAN: Under this appeal to the Government, 52(1), is it assumed that the Government has not gone by the Act in the disposition it makes of these appeals? Will you be dealing with that?

MR. EVANS: I will be dealing with that.

THE CHAIRMAN: I think that is important, you see.

MR. CARSON: Manitoba has proposed that Section 52(1) - -

THE CHAIRMAN: Pardon me a moment, that is the Manitoba amendment?

MR. CARSON: That is the proposal, but I am not examining the exact language of it.

THE CHAIRMAN: I would like to have it before me.

MR. CARSON: Mr. Evans is also going to deal with the language of that amendment and its effect.

THE CHAIRMAN: Just a moment, I have the Manitoba amendments here. What is the Section?

MR. CARSON: 52(1), and they have other amendments. They also deal with 38, but 52(1) - -

THE CHAIRMAN: Yes, I have that.

MR. CARSON: Your lordship will remember that they are proposing -- well, Mr. Evans is going to deal with 38 in which they propose - -

THE CHAIRMAN: But you are dealing with their proposed 52(1)?

MR. CARSON: With their proposed 52(i).

THE CHAIRMAN: Very well, go on.

MR. CARSON: And Mr. Evans is also dealing with that. I am only dealing to this extent, in the light of what I have said about 52(1), the evil that I see in 52(1), and I say that evil will become even greater by the proposed amendment of Manitoba to 52(1), because they suggest now by their amendment that the Governor in Council may not only vary or rescind any order, decision, rule or regulation of the Board, but should also have power to review, change or alter. Well, "change or alter" are about the same thing. They say there should be the power also to review, change, or alter any such order, decision, rule or regulation, and further, may remit any matter to the Board with directions respecting the disposition thereof.

THE CHAIRMAN: That is the new part?

MR. CARSON: That is the new part.

THE CHAIRMAN: Well, when they are empowered to remit any matter to the Board with directions respecting the disposition thereof, they might just as well do the thing themselves as tell the Board to do that.

MR. CARSON: Oh, yes.

THE CHAIRMAN: I mean, if they have that power.

MR. CARSON: Yes.

THE CHAIRMAN: But I think the important point to be borne in mind now is the question whether the Governor in Council under 52(1), is not bound by the Act just the same as the Board is. Are they to step outside the Railway Act and do things that the Act does not provide?

MR. CARSON: They have an absolute discretion.

THE CHAIRMAN: That is just what I am asking.

We shall expect to hear from Mr. Evans. Now, I am now talking of the Manitoba amendment.

MR. CARSON: You are talking of 52(1) as it stands.

THE CHAIRMAN: Insofar as the Manitoba amendment is concerned, does it really make much difference, provided the Government can do a thing, whether they do it themselves or simply direct the Board to do it, what is the difference?

MR. CARSON: You see, Parliament has never said in the Railway Act that the Governor can remit any matter to the Board with directions.

THE CHAIRMAN: I know.

MR. CARSON: Manitoba wants to have it so that the Government can do that.

THE CHAIRMAN: Not only remit, but tell the Board what to do, but is that really as objectionable in practice as it looks to be in print, because, you see, if they can remit it to the Board -- I mean, right today.

MR. CARSON: Yes.

THE CHAIRMAN: With instructions as to what they are to do, that means they could do it themselves if they chose to.

MR. CARSON: No.

THE CHAIRMAN: The Government itself could make an order so long as it rests within the Act, that an appeal before it should be disposed of in such a way. That is what they are doing when they say that "instead of doing it ourselves we remit it to the Board with instructions for the Board to do it." Is that much of a difference?

MR. CARSON: I think there is a very great difference.

THE CHAIRMAN: All right, I would like to hear

it then.

MR. CARSON: You see, with 52 as it stands, they have the power to vary or rescind.

THE CHAIRMAN: Yes, but the order says that they have power to vary or rescind, we would have to assume -- are all orders within the jurisdiction of the Board?

MR. CARSON: Well, of course, Parliament has put that limitation on them.

THE CHAIRMAN: No, but these orders made by the Board, you see.

MR. CARSON: Yes?

THE CHAIRMAN: Well then, prima facie these orders were within the jurisdiction of the Board to make?

MR. CARSON: Yes.

THE CHAIRMAN: Now, it is that kind of order that they can vary or rescind?

MR. CARSON: Yes.

THE CHAIRMAN: Are you arguing now that in varying or rescinding the Government can step outside the Act to do what it likes, which the Board would not have had jurisdiction to do in the first instance?

MR. CARSON: Yes, they can only vary or rescind to do something the Board has done working within the framework of the Act, but under this new amendment, the one that Manitoba has proposed, under this Manitoba amendment, they can go a great deal further. They can send it back to the Board and direct the Board how they are to dispose of it.

THE CHAIRMAN: The disposition must still remain in the Act?

MR. CARSON: Yes, but of course the Board has very broad powers within the Act.

THE CHAIRMAN: I know.

Mr. Carson

COMMISSION ANGUS: Would this be a question that would raise that point, that the Board has sometimes said: "We do not do so and so because we have not got power to do it". Could the Government deal with that order and say: "We vary it so that this is done, although you have no power to do it"?

MR. CARSON: Mr. Evans tells me that you are going to hear part of his argument. He ought to be here answering this, because we divided - -

THE CHAIRMAN: The Board has power to do anything that the Act authorizes them to do and nothing else

MR. EVANS: May I put the point? I am going to argue to your lordship as to this, but the Board is given a discretion, and the Governor in Council simply gets its discretion substituted for the Board's discretion that goes far further than the present provision which says "We may vary or rescind" because there the Governor in Council has to take the responsibility of saying: "We are going to make the order so and so."

THE CHAIRMAN: Pardon me, any order they make must be one justified by the Act, mustn't it?

MR. EVANS: I won't go so far as to say that.

THE CHAIRMAN: Well, that is very important.

MR. EVANS: Yes.

THE CHAIRMAN: If the Governor in Council has power to throw the Act aside and do what it likes, that is one thing; but if the Governor in Council in acting, has always power, acts within the four corners of the Statute, that is another thing. If it is as you fear it is, then that is really not appeal at all; it is a legislative power that would be used.

MR. EVANS: It is the Governor General in Council exercising its discretion in substitution for the Board's

discretion.

THE CHAIRMAN: Yes, I know, but discretion is something which may be unlimited or limited by Statute.

MR. EVANS: Yes.

THE CHAIRMAN: That is the point. Is it a discretion within the Statute or one outside the Statute, because if it is outside of the Statute it is equivalent to legislation. All right.

MR. CARSON: I should not get into that aspect of it, but the Section I was talking about at the end of my argument at page 50 was that plainly the effect of this proposed amendment would be to extend considerably the present power of political interference and would be a step of the most retrograde character.

All that I have said in support of our submission for the entire repeal of sub-section (1) would apply with even greater force to the amendment proposed by Manitoba. Mr. Evans will have something to say on the proposal of Manitoba to permit greater interference with the Board by the executive arm of Government.

COMMISSIONER INNIS: I should like to get one point cleared up. The Commission presumably would be independent in the determination of rate cases and so on?

MR. CARSON: Yes.

COMMISSIONER INNIS: And I am a little bit worried as to the position of Parliament which is concerned with paying the deficits for example of the Canadian National Railways which may or may not result in those rates. Now, does it mean you have a Board which is independent of the power of the purse, or just how do you get around that problem? That is why I was asking about Saskatchewan as to how it was affected in that case.

MR. CARSON: Well, I don't see quite that there would be any connection between the Board having independent

power to fix railway rates for the railways generally in Canada, including the Canadian Pacific and the T.H. & B. and Ontario North, and the Temiscouata, or any railway. There is to be one rate, and the mere fact that one railway happens to be nationally owned in my submission would be no reason for making the rate-making tribunal subject to the over-riding power of the Governor, to political interference by the executive arm of Government. I quite recognize that Parliament sitting here, Parliament has the responsibility to deal with these things, and the Canadian National, as the state-owned railway, has to turn to Parliament to have its deficit made up, but I do think there is separation between the two, when one considers the skein of railways we have with only one really that is state-owned.

THE CHAIRMAN: Well, Parliament cannot create any body and put it above itself.

MR. CARSON: Oh, no.

THE CHAIRMAN: It cannot do that.

MR. CARSON: No.

THE CHAIRMAN: Any body operating, no matter how independent.

MR. CARSON: Quite so.

THE CHAIRMAN: Parliament is still there.

MR. CARSON: It must behave within Section 91 of the B.N.A. Act.

THE CHAIRMAN: Anything that Parliament gives they can take away.

COMMISSIONER INNIS: I think political pressure is almost certain to come in by Parliament as soon as you appeal.

MR. CARSON: Well, any method by which they can be made to listen to that pressure is something, I submit, that is desirable where there are controversies

which are decided by somebody who is impartial and weighs, the views of the provinces and the shippers and the consignees and the railways; but when you have got that open invitation, when anyone knows that all that is needed is to get the Cabinet Minister on the telephone and get him thinking about it -- it must be an awful nuisance to men holding those responsible positions. I would think the Government would welcome being rid of this thing.

COMMISSIONER INNIS: You don't think the Government welcomes it?

MR. CARSON: I wouldn't think so, I wouldn't think^{it}/is happy with 52(1), all the pressure that is put on it. I am thinking of all that has happened in the last three or four years.

THE CHAIRMAN: For your present purposes, of course, you are arguing that if it had not been for this possibility of appeal to the Government, then this time lag of which you complain would have been greatly shortened?

MR. CARSON: I submit it is, and in my argument I follow what has happened during the course of these cases, where the Board have here felt that they must go out and hear what everybody had to say.

THE CHAIRMAN: That is another thing, you see.

MR. CARSON: That is one very important factor in the time lag.

THE CHAIRMAN: This is regional sittings, you mean?

MR. CARSON: Yes.

THE CHAIRMAN: Do you think the Board was actuated in deciding to hold regional sittings by the fact that there was an appeal hanging over them by the Government?

MR. CARSON: As I tried to put it - -

THE CHAIRMAN: I wouldn't jump at that conclusion at all.

MR. CARSON: Of course, this is not like a murder case where you can show that the fellow held the gun and killed the dead man. There have to be some inferences drawn.

THE CHAIRMAN: Yes, you see, Dr. Angus reminds me that the United States Commission holds regional hearings.

MR. CARSON: They were not the same character of regional hearings as we - -

THE CHAIRMAN: I notice what you told us this morning, that in this present case the Board itself discussed whether it was advisable to hold regional sittings or not.

MR. CARSON: Yes.

THE CHAIRMAN: Some of the members of the Board were in favour of holding them, some were opposed to it, and the majority prevailed and they decided to hold them.

MR. CARSON: Yes.

THE CHAIRMAN: I would not assume from that that the majority were actuated all the time by the idea that there was an appeal, and "that is why we had better have these sittings".

MR. CARSON: No, the ground on which the Provinces put it was that everybody in Canada should have the right to be heard.

THE CHAIRMAN: Wouldn't they do that anyway even if you have no Board?

MR. CARSON: In the early stages there has to be a little growth; people have to start to feel their independence. If you have 52 (1) repealed, I would think after a bit a competent and efficient Board would say:

"No, our issue here is a financial issue, and we have machinery here for hearing your complaints. We have the General Freight Rates Investigation. You can always come here and be heard, but the general revenue cases must not be cluttered up with every kind of grievance and problem that every shipper and consignee might think he has in Canada". That was clearly pointed out in the passage in Dearing and Owen to which I referred, that in the view of those authors, that has been one of the troubles in the United States in causing a time lag. Think of the time lag there compared with the time lag here. I mean, when Mr. Frawley said it doesn't matter whether anybody turns up, it doesn't matter at all. It is an awful waste of public money to be going down there on any such excursion when it doesn't matter whether anybody turns up so long as you can quieten down the howl of people who would say: "Well, this rate case was heard, was determined, without our having the opportunity of being heard". The important people to be heard in general rate making cases are chartered accountants and financial people, and the lawyers who are protecting these people. They are the voice that could take care of these problems. To take time, as we did in that case, to have someone ask: "What is the rate on tomatoes from some place in British Columbia or Alberta, wherever it was, A to B?" "What is the rate on tomatoes in Quebec from A to B?" And to take up all the time comparing that sort of thing: that has no place in a revenue case. As I have tried to make clear throughout this argument, there is a time and occasion for all these things, there is a machinery now in existence now for dealing with these things.

THE CHAIRMAN: Yes, but of course the Board had it within its power to say what you are saying, to say:

"We will deal with these things later."

MR. CARSON: Yes, the Board had it in its power, but the Board could not help but be conscious of the howl that would go up in Canada if there was a freight rate increase and a lot of people across the country, as I say, fanned by public speeches and that kind of thing, say: "We did not get a chance to be heard". No one disputes the right of anybody to be heard on anything that is relevant.

THE CHAIRMAN: I see what you are complaining of, but I am not so sure that by abolishing appeals to the Government you are going to put an end to all that.

MR. CARSON: Well, when one thinks of the emphasis that is put in the United States on keeping that Interstate Commerce Commission absolutely free from the slightest suggestion of any political interference or influence, and then over there there has been an unfortunate time lag. The comparison that emerges out of this, the time lag there and here is simply startling, and it is startling when you see in the exhibit I put in, that the Canadian Pacific has lost over \$80 million in the last three years that they could never get, it has gone.

Now then, I want to come to the last amendment in this Section, and that is dealt with on page - -

THE CHAIRMAN: Pardon me, are you talking now of the Manitoba amendment?

MR. CARSON: No, I am coming now to another amendment I propose, an amendment to Section 52(2).

THE CHAIRMAN: That is, appeal to the Supreme Court?

MR. CARSON: Yes .

AMENDMENT OF SECTION 52(2)

27. We have one other proposal to make for an amendment to Section 52, and that proposal is directed to sub-section (2) and it is developed in Part I of our submission commencing at the top of 150 and extending to the middle of page 151. It should be the middle of page 150, because I did already read to the middle of 150.

"Under the Act as it now stands, an appeal to the Supreme Court of Canada upon any question of law can only be had if the Board decides that the question is one of law and grants leave to appeal. If, on the other hand, an appeal is desired on a question of jurisdiction, an appeal may be had upon leave being obtained from a judge of the Supreme Court or upon leave being obtained from the Board. It would not seem to be right that the Board which rendered a decision that involves a question that may be one of law, should be the only tribunal to determine whether such question is one of law and whether an appeal should be had. The problem that arises in determining whether a particular question is one of law or of fact is often a difficult one."

THE CHAIRMAN: Mr. Carson, would you point out to me in what respect there is any difference between a question of jurisdiction and a question of law?

MR. CARSON: My lord, every question of jurisdiction is a question of law, but every question of law is not a question of jurisdiction.

THE CHAIRMAN: I know, but if you can appeal any particular question of law, that embraces the question

of jurisdiction.

MR. CARSON: Yes, but under the Act as it now stands if the question of law is one of jurisdiction, you can go either to the Supreme Court Judge - -

THE CHAIRMAN: I am just wondering why there is that distinction.

MR. CARSON: But there are many questions of law that are not questions of jurisdiction. For instance, the very appeal that we took up last December was a question of law and not a question of jurisdiction. I could not have gone to the Supreme Court Judge to get that leave to appeal.

THE CHAIRMAN: All the questions of jurisdiction are questions of law, but all questions of law of course are not questions of jurisdiction.

MR. CARSON: Quite so.

THE CHAIRMAN: Why is this distinction made about the procedure in one case and that in the other?

MR. CARSON: I don't know, but it is - -

(Page 23045 follows)

THE CHAIRMAN: What are you proposing?

MR. CARSON: May I just finish --

THE CHAIRMAN: Are you proposing that the leave in all these cases be got from a judge?

MR. CARSON: I am proposing that Section 52(2) should be amended by inserting after the words "question of jurisdiction" in line 2 --

THE CHAIRMAN: Where do I find that?

MR. CARSON: You will find that, my lord, on page 151 of Part I of our brief;

"It is therefore submitted that your Commission should recommend that subsection (2) of section 52 should be amended by inserting after the words 'question of jurisdiction' in line 2 thereof the words 'or upon a question of law'."

So that we could go to a judge of the Supreme Court, or the provinces could go to a judge of the Supreme Court, and have them decide whether there was a question of law upon which leave to appeal should be granted.

Now, just to continue, if I may, at the bottom --

THE CHAIRMAN: Do you know whether that suggestion of yours is contested in any way by the provinces?

MR. CARSON: Nobody has expressed any view. I am reminded that Mr. Smith felt it was not necessary to make the amendment that we propose.

Looking at the bottom of page 150:

"In Rogers Majestic Corporation vs City of Toronto (1943) S.C.R. 440 the judgment of the Supreme Court at page 446 states:-

'Whether there is a question of law or the construction of a statute upon which an appeal lies to the Court of Appeal is

not always free from difficulty.

Probably no satisfactory definition can be framed so as to cover all circumstances.'

"In *Farmer vs Cotton's Trustees* (1915) A.C. 922, Lord Parker at page 932 points out that it is not always easy to distinguish between questions of fact and questions of law and that the views expressed in the House of Lords had been far from unanimous. It follows then that the court to whom it is proposed to take an appeal should be the tribunal to determine whether the decision of the lower tribunal has raised a question of law or of fact and whether in the circumstances leave to appeal should be granted."

THE CHAIRMAN: Is that last sentence of yours taken from that judgment?

MR. CARSON: Oh, no. That is my argument based upon what Lord Parker said.

"It is respectfully submitted that it should be open to a judge of the Supreme Court of Canada to determine on the application of an interested party whether a question arising out of a decision of the Board is one of law and whether leave should be granted."

Then I conclude with suggesting what the amendment should be.

THE CHAIRMAN: The Act, of course, now requires that the Chairman of the Board shall be a lawyer.

MR. CARSON: Yes; I am going to come to that..

THE CHAIRMAN: And also the Vice-Chairman; isn't that so?

MR. CARSON: Yes. I am just going to come to

that in a moment, if I may.

THE CHAIRMAN: That may have something to do with it.

MR. CARSON: Yes, it has a good deal to do with that very point, I think. I have been putting it to the Commission how difficult this question is sometimes as to whether a particular question is one of law or of fact, and I have cited the Supreme Court of Canada and the House of Lords, and since our brief was put in I have added some cases that your lordships will find on page 50 of the written argument, as follows:

Commissioners of Inland Revenue v. Korean
Syndicate Limited

(1921) 3 K.B. 258, per Lord Sterndale,
M.R. at page 269-1/3

Inland Revenue Commissioners v. Lysaght

1928 A.C. 234 - per Lord Buckmaster at p. 247½

J. H. Bean v. Doncaster Amalgamated Collieries Ltd.

(1944) 2 All England Reports, 279
per Scott L.J., at p. 282½
per Du Parc L.J. at p. 283-7/8 and
at p. 284-1/3

City of Toronto v. Simpson's Limited

1949 S.C.R. 234 per Kerwin J. and
Estey J. at p. 237-7/8 and 238.

THE CHAIRMAN: Well, of course, it is a fact; we know that the difficulty is there.

MR. CARSON: Yes; it is a difficulty that the courts are so frequently encountering.

THE CHAIRMAN: And one of the ways out is to say that it is mixed law and fact.

MR. CARSON: Well, sometimes when you get it mixed with a good mixture you can have them say it is a case where leave should be granted.

THE CHAIRMAN: I wish you would tell me whether in practice you have found the present procedure unsatisfactory.

MR. CARSON: I think so, my lord. I am still going to come to that, too, in a moment or two.

Take the last case I refer to there, City of Toronto vs Simpson's Limited, that is a case where I had a narrow squeak myself. They divided three to two upstairs on whether a given question was one of law or fact. Now, when you get a case where five judges in the Supreme Court can differ like that, three to two, it is the kind of question that in my submission is of such importance and difficulty that it is too much, in all fairness, to leave to the Board of Transport Commissioners, which is the tribunal from which you are trying to get the appeal; you are trying to appeal from them.

The principle has been firmly laid down that when an application is made to the Board for leave to appeal upon a question of law, it is the duty of the Board to decide whether the proposed question is one of law or not. No matter what decision the Board comes to as to whether it is a question of law or not, that decision is not open to review. That is the end of it.

The principle to which I have referred was clearly enunciated --

THE CHAIRMAN: Would you say it is the end of it?

MR. CARSON: Yes, it is absolutely the end of it.

THE CHAIRMAN: It does not create a question of law in itself?

MR. CARSON: No. I am just citing an authority in the next paragraph:

The principle to which I have referred was clearly enunciated by Mr. Justice Anglin, as he then was, in Canadian Pacific v. Regina Board of Trade, 1911, 44 S.C.R. 328.

When you come up to the Supreme Court, if you have not got an order that says that in the opinion of the Board this is a question of law, the door never opens for you upstairs, you never get in there at all; and, even though they wrongly decide that a given question is not a question of law, you still cannot ask the Supreme Court to review it.

THE CHAIRMAN: You refer to a decision of Mr. Justice Anglin; is that in this court, in the Supreme Court?

MR. CARSON: Of the Supreme Court of Canada, where someone came along for leave --

THE CHAIRMAN: Oh, it was an application to him in chambers, was it?

MR. CARSON: Yes, because under the Act it has always been to a single judge that you must go for leave. He laid down that principle that I just put in the previous paragraph, in that very case.

THE CHAIRMAN: That where the Board has decided that the matter is not one of law --

MR. CARSON: May I just turn to it, to be sure of it. That was a motion to extend the time for the inscription for hearing of an appeal granted by the Board of Railway Commissioners, as they then were, under Section 56(3). That was the number of the section at that time; the 3 that we have now is 52(3).

THE CHAIRMAN: The Board then had granted the leave to appeal?

MR. CARSON: Yes, and this was a motion to extend the time for setting down an appeal. Mr. Justice Anglin, as he then was, said:

"The questions of law in respect of which the Board has given leave are not stated or

otherwise defined in its order granting leave. The statute clearly contemplates that the Board shall, before granting leave to appeal, determine that any question upon which an appeal to this court is allowed is a question of law. This involves the idea that the leave of the Board shall be given in respect of one or more specific questions, which should be stated, or otherwise sufficiently defined, in the order granting the leave. It is not for the parties, under a general order for leave to appeal, to raise such questions as they may wish to prefer, as questions of law; neither is it for this court to decide whether any question raised upon an appeal is or is not a question of law. The statute confers this power and imposes this duty upon the Board whose decision upon it is not open to review."

THE CHAIRMAN: It would be a curious situation, then, if the Board granted leave to appeal on a question which the Supreme Court decided was not a question of law at all but merely one of fact.

MR. CARSON: Yes.

THE CHAIRMAN: What would they do?

MR. CARSON: Well, I think I could find cases; I think there was a case where that came up, but the trouble we are concerned with in our proposed amendment, or at least what is involved in our proposed amendment, is that we are saying, let a Supreme Court judge determine whether the given question is a question of law and whether leave to appeal should be granted.

I remind the Commission of the provision of

Subsection 2, of Section 12 of the Railway Act, reading as follows: -- now, this is in answer to a point that your lordship put to me a moment ago --

"12(2) The Chief Commissioner, when present, shall preside, and the Assistant Chief Commissioner, when present, in the absence of the Chief Commissioner, shall preside, and the opinion of either of them upon any question arising when he is presiding, which in the opinion of the commissioners is a question of law, shall prevail."

Now, see the situation there. It is to be remembered that under the Act only the Chief Commissioner and the Assistant Chief Commissioner are required to be lawyers. There is no such requirement in the selection of the Deputy Chief Commissioner, although it happens that the present Deputy Chief Commissioner is a member of the Bar of Quebec. The result is that the problem of determining whether a given question is one of law or not, which has given great difficulty in many cases under other statutes not only to the Supreme Court of Canada but to the House of Lords in England, may require under the present section 52(3) to be decided by the Board, some members of whom are without legal training or experience.

Your lordship will see, under that Section 12(2), when a question arises which in the opinion of the Commissioners is a question of law --

THE CHAIRMAN: Section 12(2)?

MR. CARSON: Yes, 12(2). So that with a six-man board sitting, if there was a real argument as to whether it was a question of law, and under the Act you happened to have two lawyers and four laymen, or four

non-lawyers I should say, you might have a majority saying, "This is not a question of law," the four non-lawyers might say, "This is not a question of law", and that would be the end of it.

THE CHAIRMAN: Well, we will take a few minutes now.

(Recess)

MR. CARSON: My lord, I feel I am proceeding at a terrific clip, but I am trying to be fair to my colleagues, with whom I have apportioned the time for argument.

THE CHAIRMAN: That is quite all right. You have been dealing now with Section 12(2).

MR. CARSON: Yes.

THE CHAIRMAN: Are you dealing with it in relation to this leave to appeal?

MR. CARSON: Yes, my lord.

THE CHAIRMAN: Are you quite sure that section is intended to cover that?

MR. CARSON: No, but it is important in this way, looking back at it -- may I just read it again:

"The Chief Commissioner, when present, shall preside, and the Assistant Chief Commissioner, when present, in the absence of the Chief Commissioner, shall preside, and the opinion of either of them upon any question arising when he is presiding, which in the opinion of the commissioners is a question of law, shall prevail."

THE CHAIRMAN: What is the meaning of "the opinion of either of them"? That is the opinion of the presiding

officer?

MR. CARSON: Yes.

THE CHAIRMAN: "Shall prevail."

MR. CARSON: Yes.

(Page 23054 follows)

THE CHAIRMAN: Upon any question which in the opinion of the Commissioners is a question of law.

MR CARSON: Yes.

THE CHAIRMAN: A rather queer way of putting it.

MR CARSON: Isn't it? Because if you had a Board presided over by the Chief Commissioner and two non-lawyers were sitting with him, and some question came up, for instance if I were there applying for leave to appeal on a question of law, whether we should get leave to appeal would depend first upon whether there was a question of law, but under this section 12(2) the three of them or a majority of the three must decide that it is a question of law, and conceivably the two non-lawyers might say, "This is not a question of law."

COMMISSIONER ANGUS: Well, Mr. Carson, if they say, "Well, whether this is a question of law or not is itself a question of law," then it is the decision of the presiding officer that determines it.

MR CARSON: Well, that is the way Parliament has left it -- "which in the opinion of the commissioners is a question of law". When the three of them decide it is a question of law, then the others stop voting; then the Chief Commissioner decides that question.

COMMISSIONER ANGUS: That would happen in their ordinary proceedings, when there was no question of law at all.

MR CARSON: Quite so.

COMMISSIONER ANGUS: And then if they had to decide whether something was a question of law for the purposes of an appeal, either they would decide it by a majority, decide that it is a question of law or it is not a question of law, and that finishes it, or they decide that a question of law arose in that decision, and then it would

be decided by the presiding officer.

THE CHAIRMAN: Well, that seems to be a complicated provision.

MR CARSON: Mr. Evans reminds me that it is not a question of law as to whether something is a question of law.

COMMISSIONER ANGUS: That is what I wondered; but unless that happens does 12(2) matter very much?

MR CARSON: 12(2) would have this application, in my view, that if I came before a Board of three with the Chief Commissioner, the lawyer, presiding, and two non-lawyers, and I said, "Now, I have a question of law upon which I want to get leave," first I have got to satisfy them that it is a question of law, and secondly I have got to satisfy them that it is a proper case in which to grant leave, and the point there is, have you got a fairly arguable thing to take up to the Supreme Court. Now, on the first question, under section 12(2), with those three sitting, the two non-lawyers could out-vote the legal member and say, "In our opinion this is not a question of law," and that would be the end of me; I would never get to the argument of the next point. But once they said, "It is a question of law," then the Chief Commissioner or the Assistant Chief, who is presiding, his opinion prevails.

COMMISSIONER ANGUS: He can decide it.

MR CARSON: He decides what is then decided is a question of law. He decides what the answer is. The others do not decide what the answer is.

THE CHAIRMAN: What is left for him to decide in the ordinary case? I find this section 12 is not introduced under the chapter on review and appeal, you see; it comes long before it. It is a matter of ordinary procedure. It is under the chapter which sets up the constitution of the Board, and then gives the powers and the procedure. Then it says that

when they are carrying on their duties, sitting, as you say there, if in the opinion of the Board any particular question is one of law, then whatever the Chief Commissioner decides in consequence of that prevails. I wish I could understand just what is left for him to do. Supposing, you see, somebody says, "You can't do this, because it would be illegal, the Act does not allow you to do it," and the majority of the Board say, "Oh, this is not a question of law at all, this is just a matter of fact," then what does the Chief Commissioner do?

MR CARSON: Well, if they say, "This is not a question of law at all," then he does not function under 12(2).

THE CHAIRMAN: Suppose they say, "It is a question of law," then what does he do?

MR CARSON: Then his opinion prevails.

THE CHAIRMAN: On what?

MR CARSON: On what the answer is to the question of law. But when it comes to whether you should get leave, you see, coming to the second stage of the application, then the majority commence to function again. There having been a decision, it is a question of law, then the majority decide whether you should have leave to appeal.

THE CHAIRMAN: Has this subsection 2 of 12 always been in the Act?

MR CARSON: Oh, I think, as far as I can remember, yes.

THE CHAIRMAN: Has it ever been interpreted?

MR CARSON: I do not think so.

THE CHAIRMAN: It is just there.

MR CARSON: But you might have this situation -- this is not inconceivable -- I am taking an extreme case: Suppose as the Act now stands, with only two of the six

that are required to be lawyers, and we all know that the Board has been sitting in panels over the last two or three years, three out in British Columbia, and two or three in Ottawa, and two constitute a quorum -- now, if it happened that one had to make an application for leave to appeal to the Supreme Court -- and there is a time limit, you see, it must be done within a month -- suppose one could only get the three non-lawyers or two non-lawyers to constitute a quorum, and you go to them with what would be a very difficult question perhaps for the House of Lords or the Supreme Court upstairs, under the Act today the two non-lawyers would have to decide that important question.

THE CHAIRMAN: I see, though, that the relevant section for procedure on appeal is subsection 3 of 52.

MR CARSON: Yes.

THE CHAIRMAN: That says:

"An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, or a question of jurisdiction . . ."

MR CARSON: Yes.

THE CHAIRMAN: Now, if that has never been changed since 1903, the fact is that at that time the Board was composed of three.

MR CARSON: Yes.

THE CHAIRMAN: Two of whom were lawyers. I think so.

MR CARSON: I have forgotten.

THE CHAIRMAN: One of them was Mr. Blair.

MR CARSON: Yes.

THE CHAIRMAN: And I think the other one was a man named Bernier from the Province of Quebec; I think he was a

lawyer; that would make two out of three.

MR CARSON: Yes.

THE CHAIRMAN: Might it have been with that set-up before them that the Act took this form?

MR CARSON: Well, it might have been.

THE CHAIRMAN: And it has never been changed since.

MR CARSON: That they always contemplated they would have a majority of lawyers; but, as I say, under this Act---

THE CHAIRMAN: Well, pardon me. If the Act always said that both the Chairman and the Vice-Chairman must be lawyers---

MR CARSON: Well, the Act says today that the Chief Commissioner and the Assistant Chief Commissioner must be lawyers.

THE CHAIRMAN: If it said that at a time when there were only three, that only left one non-lawyer.

MR CARSON: That only left one non-lawyer, yes.

THE CHAIRMAN: And you can understand then how the fear you have would not exist to the same extent.

MR CARSON: Quite so.

THE CHAIRMAN: I wonder whether that is the explanation of it.

MR CARSON: Well, perhaps we could have that looked up, because I cannot call it to mind.

THE CHAIRMAN: In any event, you say that as things are today the opinion of the Board saying that a certain question is one of law or one of fact, is given by a Board the majority of whom are not necessarily lawyers.

MR CARSON: Quite so. That sums it up quite completely.

THE CHAIRMAN: Supposing that that provision were changed to say that an appeal shall also lie from the Board

to such court upon any question which in the opinion of the Chief Commissioner is a question of law.

MR CARSON: Well, the trouble is, you see, if it were left that way you must get hold of the Chief Commissioner, and there is a time limit.

THE CHAIRMAN: Or the Assistant.

MR CARSON: Well, you must get hold of him, and there is a time limit.

THE CHAIRMAN: One or the other.

MR CARSON: Yes; and, as I say, the Board has been sitting in panels.

THE CHAIRMAN: I know, but I do not think you would have any real difficulty there.

MR CARSON: It is a pretty serious thing, my lord, if it were an important question of law involving substantial amounts and you lost your chance to have the leave granted because somebody was not in Ottawa.

THE CHAIRMAN: What is the time for appeal?

MR CARSON: Within a month after the making of the order sought to be appealed from.

THE CHAIRMAN: That time cannot be extended?

MR CARSON: Or within such further time as the Board under special circumstances shall allow, yes.

THE CHAIRMAN: Well, there you are. If there was an appeal provided instead of to the whole Board to the Chief Commissioner or to the Assistant Chief Commissioner---

MR CARSON: My lord, I am not asking to have subsection 3 changed. I am content to leave it that you can still go to the Board on a question of law or jurisdiction, or to the Supreme Court.

THE CHAIRMAN: That you might at your own option go to a judge of the Supreme Court?

MR CARSON: Quite so; because you can go of your

own option to the Board or to the Supreme Court on a question of jurisdiction; but on a question of law that is not a question of jurisdiction you can only go to the Board, and I think, if I may say so, it is often more difficult to decide whether it is a question of law or not than to decide whether it is a question of jurisdiction or not.

THE CHAIRMAN: Well, that is law too, of course.

MR. CARSON: Yes, but if it is purely a jurisdiction point I do not think there is the same difficulty in deciding that it is a jurisdiction point.

THE CHAIRMAN: No, because the jurisdiction point ^{Board} asks the question, has the power to do this or that?

MR. CARSON: That is it.

THE CHAIRMAN: It is a simple question.

MR. CARSON: A simple question compared with whether it is a question of law.

THE CHAIRMAN: A self-evident question of law.

MR. CARSON: I would think so, in most cases.

COMMISSIONER INNIS: Your position is outlined here in paragraph 2 on page 52?

MR. CARSON: Yes, my lord.

We are not asking you to recommend that any change be made in subsection 3, but we are urging you to recommend the amendment of subsection 2 by inserting after the words "question of jurisdiction" in line 2 thereof, the words "or upon a question of law".

THE CHAIRMAN: An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction.

MR. CARSON: Or upon a question of law.

THE CHAIRMAN: Or upon a question of law, upon leave being obtained from a judge of the Supreme Court.

MR. CARSON: Yes.

THE CHAIRMAN: Then you leave 3 as it is?

MR. CARSON: Leave 3 as it is.

THE CHAIRMAN: "An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law . . ."

Is there a possibility then of disagreement being found? Supposing, as in the present cases, you have been having the Province of Saskatchewan apply to the Court for leave to appeal and they got it, and the Province of Manitoba applied to the Board and the Board said, "This is not a question of law," what would happen?

MR. CARSON: Saskatchewan could go on with its appeal.

THE CHAIRMAN: And the other province could not?

MR. CARSON: Well, I would think that in circumstances like that --

THE CHAIRMAN: Don't you think it is better, where the appeal is restricted to questions of law, to have just the one body to go to for leave to appeal?

MR. CARSON: Well, I would think it would be better to have a Supreme Court judge alone deciding whether it was a question of law.

THE CHAIRMAN: Well, all right.

MR. CARSON: The result would then be that in the case of a question of law, as well as under the present law in the case of a question of jurisdiction, an appeal could be taken from the Board to the Supreme Court of Canada, either by leave of a judge of that court under subsection 2 or by leave of the Board under subsection 3.

Apart altogether from the objection to the present legislation which leaves it solely to the Board to determine what is frequently a difficult legal question -- as to whether a given question is one of law or of fact -- there is still another objection to the present law, and it

is this. On an application for leave to appeal, the applicant must convince the Board on two matters:

- (1) that the proposed question is a question of law and not a question of fact;
- (2) that if it is a question of law, it presents a fairly arguable controversy.

The Commission will thus appreciate that leave to appeal cannot be obtained just as a matter of course.

Put in another way, the applicant must say to the Board -- "Your decision is such that it is fairly arguable you have made a mistake in law, and we want the opportunity to go to the Supreme Court of Canada for the purpose of having that court say your decision in that respect is wrong."

One cannot overlook the natural human tendency of anyone who has rendered a decision to believe quite honestly that his decision is right. Nor can one overlook the natural human tendency inherent in some individuals to resent being told by someone else that he has made a mistake. Such tendencies may not consciously exist in the mind of a particular person, but we must recognize that in some people of unquestioned good faith they do exist in fact.

These observations lead me to suggest to your Commission that under the present law there may be perfectly proper cases in which leave to appeal on a question of law will not be granted when it would be granted if considered by an independent judicial tribunal.

THE CHAIRMAN: I think it would be well, though, to know just what the lesson of experience has been, whether difficulty has been encountered in getting --

MR. CARSON: My lord, the Board has said, I mean one Chief Commissioner has said, "We are not loathe to have our decisions reviewed."

THE CHAIRMAN: Have they refused leave?

MR. CARSON: Oh, there have been cases where they have refused, yes. I should not take the time here to argue whether they were right or wrong in any particular case, but as a matter of principle I say it is not sound to leave the determination of that important question, first to the tribunal from whom you are trying to have the Supreme Court say they are wrong, and secondly from a tribunal whose majority members may under the Act be non-lawyers.

THE CHAIRMAN: Yes; you are talking now theoretically, are you?

MR. CARSON: Well, no, my lord, I am talking --

THE CHAIRMAN: I mean to say, you say in theory it is a bad thing to provide that the court from which you are appealing is the one that is to give you leave to appeal?

MR. CARSON: Yes, but I am talking in principle, of the principle; I am still addressing myself to the Act as it now stands.

THE CHAIRMAN: I know you are. I was asking you about whether you can show me by experience any hardship that the Act has occasioned as it now stands?

MR. CARSON: Well, my lord, I suppose there are people who have been refused leave on questions of law who might think so, but I thought I would not be very helpful to your Commission if I tried to re-argue given cases as to whether they should have given leave or should not.

THE CHAIRMAN: You gave us this morning a reference to something Mr. Blair said at one time.

MR. CARSON: Yes.

THE CHAIRMAN: Is it in your brief?

MR. CARSON: Yes, it is in my brief, my lord.

Was it on page 26? Was that the passage?

THE CHAIRMAN: No, it is where it speaks about having lawyers on the Board. You see, the Board then consisted of three.

MR. CARSON: Yes; Mr. McLean, I think it was. May I have one of my colleagues turn that up?

THE CHAIRMAN: Yes. I feel I am taking your time.

MR. CARSON: No, not at all, but there are a lot of people behind me telling me I am late.

Now, my lord, I think I have given all the reasons upon which I urge your Commission to recommend the amendment we propose to that subsection.

Then, coming to the last part of my argument, commencing on page 54, that deals with the movement of mail and other government traffic, and with the pressure of time that is on me I am going to ask the reporter to have copied into the record the full text of that argument.

(Portion of written argument copied into record follows.)

PART V

(Rates for movement of mail and other Government traffic.)

1. The Canadian Pacific is urging your Commission to recommend amendments to existing legislation so that rates for the movement of mail and other Government traffic shall be brought within the jurisdiction of the Board of Transport Commissioners.

This subject is dealt with in Part I of the Canadian Pacific Submission commencing at p. 189, with Outline Submission No. 82 and continuing down to p. 196. It is also dealt with in the evidence of Mr. Jefferson in Vol. 75, commencing at p. 15284 and continuing to p. 15318. Exhibits numbered 168 and 169 filed during Mr. Jefferson's evidence and material to be found in the Appendix to Part I of the Canadian Pacific Submission at pages 117 to 121 also relate to this subject. The position of the Canadian National on this subject is set out in its Submission at pages 185 to 188 and is similar to that of the Canadian Pacific.

2. The opening paragraph on p. 190 of the Canadian Pacific submission sets out in terms of amendments that were thought advisable at the time the submission was prepared. Further consideration of the terms there proposed led us to revise such terms - and our final submission as to the terms of amendment we urge you to recommend are set out in Vol. 75 of the transcript at p. 15285.

3. The transportation of mail by the railways for the Post Office Department is comparable in many respects to the transportation of goods for the general public. In the case of parcel post, the Post Office Department is in direct competition with the Express Companies for small package traffic. While express rates are subject to the regulation and approval of the Board of Transport Commissioners, the

Mr. Carson

Postmaster General under the present law is in a position to obtain transportation of all mail matter, including parcel post shipments, at rates established by Order in Council under the Railway Act and the Post Office Act without the control or approval of any regulatory tribunal.

When the government requires the performance of any work, the general rule is that it calls for tenders or enters into negotiations that ultimately lead to a contract. The result is that no one is compelled to perform such a work without compensation that he considers acceptable. When the Crown expropriates property, it cannot as a general rule dictate the compensation to be paid. The amount of compensation is determined by the Exchequer Court or, in some instances, by an independent arbitration tribunal.

In the case of the work performed by the railways in transporting mail, it is not a matter of choice. They are compelled by a statute to do so. The compensation for the performance of such service is not a matter of negotiation, agreement, determination or regulation by an independent tribunal. Such compensation under the present law is prescribed by the Governor in Council. Such compensation may be fixed without regard to the cost to the railways of performing the service required. Indeed, in a letter of 9th September, 1929, from the Railway Association of Canada to the Postmaster General urging an increase in the mail rates, attention was there drawn to the very considerable deficiency in revenues in relation to expenses. (See Vol. 75, p. 15293 and p. 117 of Appendix to Part I of the Canadian Pacific Submission.)

4. Despite applications made for increases and prolonged negotiations and numerous conferences that have taken place, the conspicuous fact is that the railways have been hauling mail for the Post Office Department at rates that

were established on June 1, 1922, almost twenty-eight years ago.

5. It is abundantly clear from the evidence of Mr. Jefferson at the pages I have mentioned and the correspondence to which he referred in his evidence, that the Post Office Department moves very slowly -- indeed for almost twenty-eight years they have not moved at all -- in taking any effective action with respect to mail rates.

Even in the case of the antiquated rates presently in effect, it took the railways a very long time to obtain any relief.

As Mr. Jefferson pointed out at page 15288, the railways early in 1917 made an application to the Postmaster General requesting an increase in rates. That application was referred by Order in Council to the Board of Railway Commissioners (as it was then called) on March 7, 1917. The Board submitted a report under date of July 5, 1919, but it was not until March 1, 1921, (one year and eight months after the Board's report and over four years from the time the application was made) that the Board's recommendation was made effective. Despite the long delay, for which the railways were not to blame, the new rates were not made retroactive either to the date of the application or to the date of the Board's recommendation. Some slight upward adjustments (mostly by rounding out decimal figures) were made effective June 1, 1922, as a result of a recommendation by Mr. Henry, then of the Department of Railways and Canals.

6. The application launched by the railways under date of September 9th, 1929, to which I earlier referred, led to protracted negotiations, finally culminating in an agreement by the Postmaster General under date of December 18, 1930, to recommend to the Governor in Council the

appointment of an arbitration tribunal to consider the question of costs and submit a report. As pointed out by Mr. Jefferson at page 15291, the railways were never able to have this arbitration proceeded with.

7. The application for increase that is still pending originated by letter dated November 29, 1948 (Appendix to Part I, page 118). Mr. Jefferson went on to state that after protracted correspondence and discussions, the Postmaster General wrote to the Chief Commissioner of the Board of Transport Commissioners on August 15, 1949, requesting the assistance of the Board in endeavouring to reach common ground with the railways. This letter is set out in the transcript at page 15295.

You, Mr. Chairman, summed up the situation in two sentences appearing on page 15297 when you said:

"The Postmaster General, in the final result, had the say in the fixing of the rates."

And later when you said, on the same page:

"Apparently he wanted a suggestion from them (meaning the Board) as to what the proper rates might be."

8. A long interval having elapsed without action, the railways inquired as to whether the Board's investigation was to be made under an Order in Council, whereupon a letter signed by the Postmaster General under date of September 9, 1949, was written to the Chief Commissioner of the Board of Transport Commissioners stating that this was not the intention. That letter is set out at page 15298. The letter emphasized that it was not the intention to ask the Board to give a formal opinion on the merits of the railways' request, but simply to have the Board's experts study the data and give the Post Office Department the benefit of their

experience and advice.

That the officials of the Post Office Department are admittedly lacking in the necessary experience to fairly determine such rates is made clear by the last paragraph of that letter in which it is stated:

"Naturally, the officials of my Department are not intimately versed in the complexities of the factors governing railway rates and, therefore, I feel sure that the assistance and advice of your experts would be of great help in our endeavour to arrive at a common understanding on which I could base a recommendation to my colleagues."

The need of the Post Office Department to have the assistance of experienced experts was given further emphasis in a letter dated 10th September, 1949, from the Postmaster General to the Railway Association of Canada, in which, as appears at page 193 of Part I of the Canadian Pacific Submission, the Postmaster General stated:

"It is generally admitted that the question of mail conveyance rates cannot be dealt with in isolation from freight and other rates. Further, there are so many ramifications that the question is one of great complexity, calling for expert advice and assistance. It is with this in mind that I have asked the Chief Commissioner to have the data reviewed by the officers of the Board, who have expert experience and knowledge in matters of this kind."

Thus we have a clear recognition by the Post Office Department that its staff does not possess the qualifications or experience necessary to determine the problem of mail rates and that the question of such rates cannot be dealt with apart from freight and other rates

now under the regulatory jurisdiction of the Board of Transport Commissioners.

9. In response to a letter from the Railway Association of January 4th last asking what progress had been made in the application of the Association launched in November, 1948 for a 55% increase, a letter signed by the Postmaster General under date of January 16, 1950, (appearing at page 15299 of the transcript) pointed out that no official word on the subject had as yet been received from the Board of Transport Commissioners. The letter urged the exercise of patience until such time as the freight rates question was finally disposed of.

10 Evidently the railways did not feel it would constitute disobedience to the admonition of patience when, later on, inquiries were made of the Board of Transport Commissioners and the Postmaster General's Department with regard to the present status of the matter. The result of those inquiries seemed to indicate some confusion or misunderstanding between the Post Office Department and the Board of Transport Commissioners because, as was pointed out by Mr. Jefferson at page 15301, advice from the Board was that the Postmaster General's Department are not waiting for an official report from any of the Board's officers and further, that the Board's officers had made a verbal report to the Postmaster General's Department and that no further report is to be made unless and until a further request is received from the Post Office Department for additional information.

Mr. Jefferson again took the matter up with the Deputy Minister of the Postmaster General's Department the evening before he gave his evidence on this subject. The Deputy Minister told Mr. Jefferson he would write a letter

to the Board the following day insisting upon a formal report from the Board's experts. I hope your Commission will not think that Mr. Jefferson was overstating the situation when he gave me the answer at page 15310:

"Well, at the present time, we are in what I might say is just a dilemma. We just seem to be going around in circles and cannot get a decision from anyone."

" (Refer to subsequent correspondence)

11. The reasons for proposing the amendment to vest the jurisdiction over mail rates in the Board of Transport Commissioners were summarized concisely by Mr. Jefferson at page 15302, as follows:

"First, as I have stated, our experience in the past has been that there are almost interminable delays in obtaining consideration and disposal of our applications.

"Secondly, as the Postmaster General himself has stated in his letters, quoted on page 193 of Part I of our submission, his Department is not experienced in dealing with the factors governing railway rates. It is evident that he must, in any event, call for our outside assistance.

"In the third place, it would seem desirable that the Board of Transport Commissioners should have jurisdiction over the rates charged for the carriage of mail, just as it has jurisdiction over the freight rates and other rates, so that there should be a proper balance maintained. This would avoid an increase in the burden upon the shippers and consignees of freight."

By way of comparison with the situation in Canada, Mr. Jefferson made reference to the United States. (See

page 15310). There, the Interstate Commerce Commission has jurisdiction over rates charged for the carriage of mails. The present provision is to be found in Section 321 of the Transportation Act of 1940. Mr. Jefferson filed as Exhibit 169 a statement showing the rates charged for the carriage of mails in the United States compared with what has happened in Canada since 1922. The United States roads were granted a 15% increase in July, 1928, made retroactive to May, 1925. An application is now pending for a 95% increase, upon which the United States railroads have received a 25% interim increase, retroactive to 1947.

The overall increase in the United States since 1922, including the 25% interim increase, has amounted to approximately 44%, as compared with no increase in that period for the Canadian railways.

It is true, as Mr. Jefferson pointed out, that the level of rates there is not wholly comparable with the level of rates here, because in Canada the railway employees do not load and unload mail to the same extent as they do in the United States and Mr. Jefferson said he would expect this to be reflected in Canadian rates.

12. In all the circumstances, the recommendation that we urge your Commission to make is, I submit, a sound one. I am not aware that the provinces have any opposition to the proposal. A copy of our submission was forwarded to the Deputy Minister of the Post Office Department and he has not presented himself as a witness to oppose the proposal. This, in my submission, is not surprising -- because I cannot think of any sound reason that could be advanced against the proposed amendment.

The amendments we propose to Section 351 of the Railway Act and Section 80 of the Post Office Act would also assign to the Board of Transport Commissioners the

jurisdiction to determine the compensation to be paid to the railways for other government traffic. This is dealt with under the heading of "His Majesty's Forces and Stores" in two short paragraphs appearing at p. 196 of Part I of the Canadian Pacific submission. On that aspect of the matter, I think I need do no more than read those two paragraphs.

MR CARSON: I want to make only one or two comments. I think probably our recommendation is summed up in paragraph 1:

The Canadian Pacific is urging your Commission to recommend amendments to existing legislation so that rates for the movement of mail and other Government traffic shall be brought within the jurisdiction of the Board of Transport Commissioners.

Then I set out in the next paragraph where you will find the evidence and exhibits on that subject.

Then in the next paragraph, 2, I say:

The opening paragraph on p. 190 of the Canadian Pacific submission sets out in terms the amendments that were thought advisable at the time the submission was prepared. Further consideration of the terms there proposed led us to revise such terms - and our final submission as to the terms of amendment we urge you to recommend are set out in Vol. 75 of the transcript at p. 15285.

THE CHAIRMAN: Are they also in this---

MR CARSON: My lord, I have copies here, and I would hope that your Commission might find it convenient to paste these in our brief opposite page 190, so that you will have them exactly in the position where they should be:

"AMENDMENT TO PART I OF CANADIAN PACIFIC SUBMISSION"

The first paragraph on page 190 of Part I of the

submission of Canadian Pacific Railway Company should be amended to read as follows:

'Canadian Pacific submits that a recommendation should be made that Section 351 of the Railway Act and Section 80 of the Post Office Act be amended by adding at the end of each section the words "save that the terms and conditions as to compensation to be paid to the Company shall be such as may be determined from time to time by the Board of Transport Commissioners for Canada".'

THE CHAIRMAN: Are they amendments to the Railway Act?

MR CARSON: Amendment to the Railway Act and the Post Office Act, and the amendments are very simple. The effect of them is to make the rates for the movement of rail and this other traffic, Government traffic, brought within the jurisdiction of the Board of Transport Commissioners.

In my written argument on page 54 and following pages I summarize the evidence of Mr. Jefferson, including, as the Commission will remember, the correspondence that has been had for some considerable time between the Postal Department and the Railway Association attempting to have the matter of mail rates adjusted; and the Commission will recall that there has been no change in the mail rates since June 1, 1922, almost twenty-eight years ago.

It is clear from the evidence of Mr. Jefferson in the passages referred to and the correspondence to which he referred in his evidence that the Post Office Department moves very slowly-- indeed for almost twenty-eight years they have not moved at all in taking any effective action with respect to mail rates.

Then on page 56 I refer to the long delays that occurred when the railways early in 1917 made an application. They did not come out with the final new rates until June 1, 1922; they were finally revised then.

(Page 23075 follows)

There had been a slight revision, there had been a revision on March 1, 1921, and then a slight upward revision on June 1, 1922 and it has then remained in effect since. Then Mr. Jefferson told about the application launched in September 1929 to go into the matter, but the railways were never able to get this tribunal under way. Then they filed an application for an increase in November 1948, and that application is still the subject of this correspondence.

Now, the Commission will remember the exhibits and the correspondence to which Mr. Jefferson referred, saying that the Post Office Department referred the matter over to the Board of Transport Commissioners. Now, that is the very tribunal we think should have jurisdiction to prescribe these rates. Then they seemed to get into a great state of confusion. The Board of Transport Commissioners had some of their experts study the matter, and the Deputy Postmaster said he did not want a formal report, and then there was some suggestion he wanted a report in writing and then the Board of Transport Commissioners did not understand they were to prepare a report in writing. When Mr. Jefferson was in the box he pointed out that in response to a letter -- before I come to that, I should remind you of this. In that correspondence the Deputy Postmaster General points out very clearly that he has not got a staff that is competent to inquire into rate-making matters at all, and it was for that reason that the matter was referred over to the Board of Transport Commissioners. Finally in response to a letter from the Railway Association of 4th January last, when they asked what progress was being made in the application launched in 1948, a letter signed by the Post Master General under date of January 16, 1950, pointed out that no official word

on the subject had as yet been received from the Board of Transport Commissioners, and his letter urged the exercise of patience until such time as the freight rates question was finally disposed of.

Evidently the railways did not feel it would constitute disobedience to the admonition of patience when later on they made inquiries with regard to the present status, and then the Board told Mr. Jefferson that the Post Master General's Department was not waiting for any official report, and that they had made a verbal report.

Now, I have obtained and I am ready to hand in, perhaps it should be marked as an exhibit, the correspondence which has taken place since Mr. Jefferson has given his evidence. I am not going to read that correspondence, but I think the Commission will find it of assistance.

EXHIBIT 286...filed by Mr.
Carson

: Copy of correspondence
: between Board of
: Transport Commissioners,
: Post Master Generals'
: Department and Railway
: Association of Canada,
: since February, 1950,
: relating to application
: in increase in mail pay
: rates.

COMMISSIONER INNIS: What was the character of the amounts involved in this?

MR. CARSON: Oh, very substantial, Dr. Innis. I think for the C.P.R. the proposed increase would bring in about \$2 million additional revenue.

COMMISSIONER INNIS: That is the 55%?

MR. CARSON: Yes. Now then, Mr. Jefferson points out at page 15302, the reasons why we propose

these amendments. He has referred to the very great difference with which the matter has been dealt with in the United States, where the Interstate Commerce Commission has jurisdiction over these subjects.

I just want to point out that in this correspondence I have now put in, we have come down to this. The Board is telling the Post Master General that they misunderstood him and he is telling them he misunderstood them, and the railways are being told to be patient while these misunderstandings are being carried on. Finally by a letter of April 27, 1950, to Mr. Brass, the Acting Post Master General says:-

"Only recently we have received an intimation from that body that they are not, in fact, able to determine with any degree of accuracy a proper rate structure. Their opinion is that the whole case seemed to rest on the fairness of old rates and the matter should, therefore, be left to direct negotiation".

They refer to the evidence of Mr. Donald Gordon and then he says:-

"We are, I think, ready now to present our own formula and this can be done either in writing or following a discussion, whichever you would prefer".

See what that means. They have already said: "We have not got the staff over here, we are not competent to go into matters like this"; and now that they have got some report from the Board of Transport Commissioners that we have not seen, or whatever the study they made, they are suggesting: "We will present a formula". That is, the Department says; "We have not got a competent staff"; says, "We will present a basis for fixing these rates".

Now, we are urging your Commission to have these rates put in the same category as any others, and leave it for the supervision and jurisdiction of the Board of Transport Commissioners.

COMMISSIONER INNIS: Did you ask for a letter? It says: "Either in writing" in the last paragraph.

MR. CARSON: I think we will be asking for it in writing, but I may not be just up to date. I think that is our plan, to ask for it in writing, but this thing has been going round in a circle now for a year and a half, a year ago last November. I think Mr. Jefferson was not overstating the matter when he said at page 15310:

"Well, at the present time we are in what I might say is just a dilemma. We just seem to be going around in circles and cannot get a decision from anyone."

Now, that should not be permitted.

PART VI

CONCLUSION

1. In conclusion, may I remind your Commission that I have urged you to recommend the amendment of four specific statutory provisions:

- (1) the repeal of subsection (1) of Section 52 of the Railway Act conferring power upon the Governor in Council to vary or rescind the decisions of the Board of Transport Commissioners;
- (2) the amendment of subsection (2) of Section 52 of the Railway Act so as to permit an appeal on a question of law to be taken to the Supreme Court of Canada with the leave of a judge of that court;
- (3) the amendment of Section 351 of the Railway Act;
- (4) the amendment of Section 80 of the Post Office Act;

these latter two amendments to vest jurisdiction in the Board of Transport Commissioners over the rates for the carriage of mail and other government traffic.

Other amendments proposed by the Canadian Pacific -- and various amendments proposed by provincial counsel -- will be dealt with by my colleagues.

THE CHAIRMAN: Would this cover this military traffic?

MR. CARSON: That is military traffic, my lord.

2. I cannot conclude without saying to you that, in my submission, and in my sincere belief, the greatest evil in the Railway Act, as it now stands, is to be found in the power of political interference with the decisions of the Board of Transport Commissioners as conferred by Section 52(1). That evil is at the very heart and core of the national transportation problem with which you are concerned.

In a country with the vast areas and great resources of Canada, safe and adequate transportation services at reasonable rates are vital to its economic welfare. So long as the maintenance and operation of national transportation, including in particular the regulation of rates, are exposed to the varying currents and fluctuating trends of political pressure, discord and dissatisfaction are stimulated and unrest is inevitable. Under such conditions, there can be no stability or confidence or satisfaction in the regulation of transportation, not only from the standpoint of the carriers, but from the standpoint of the shippers, the consumers, and the potential investors in railroad securities.

In my final word, I say to you most earnestly that a recommendation from your Commission for the removal of the political power to which I have referred

would constitute a notable and constructive contribution to the solution of the problem upon which the Governor in Council has sought your advice. In my sincere and respectful submission, Canadian history could have no finer monument to the work and accomplishments of this Commission. I thank you for the patience with which you have listened to me.

You were asking about Mr. Blair.

THE CHAIRMAN: What did he say?

MR. CARSON: It is at page 147 of Part I of our brief. That is where he said:

". . . the character, the capacity, the wisdom and the selection of the men is everything. Unless this Committee can afford men . . . of independence of character and of firmness and of fairness, men who have experience in business, experience in railway operation, experience in law . . . we cannot hope that the Commission . . . will be successful. We have to give these men such a tenure as will invite those we want. . . long enough to induce them to give up a business. We have to pay them well."

THE CHAIRMAN: I thought he said some place about lawyers on the Board.

MR. CARSON: He said: Men who have experience in business, railway operation, experience in law.

THE CHAIRMAN: That is all he said? We will adjourn now.

---The Commission adjourned at 4.45 p.m. until tomorrow, Thursday, May 18, at 10.30 a.m.

A.R.

ROYAL COMMISSION
ON
TRANSPORTATION

EVIDENCE HEARD ON

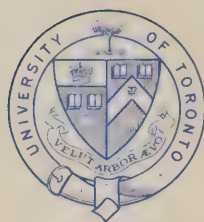
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ROYAL COMMISSION ON TRANSPORTATION

Thursday, May 18, 1950

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ROYAL COMMISSION ON TRANSPORTATION

Ottawa, Ontario,
Thursday, May 18, 1950

THE HONOURABLE W.F.A.TURGEON, K.C. LL.D. - CHAIRMAN
HAROLD ADAMS INNIS - COMMISSIONER
HENRY FORBES ANGUS - COMMISSIONER

- - - - -

G. R. Hunter,
Secretary.

- - - - -

COUNSEL APPEARING:

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G.C.Desmarais, K.C.		
F.C.S.Evans, K.C.	}	Canadian Pacific Railway
K.D.M.Spence,		
I.D.Sinclair		
H. E. O'Donnell, K.C.	}	Canadian National Railways
H. C. Friel, K.C.		
J. J. Frawley, K.C.)	Province of Alberta
M. A. MacPherson, K.C.)	Province of Saskatchewan

- - - - -

Ottawa, Ontario,

Thursday, May 18, 1950

MORNING SESSION

ARGUMENT BY MR. EVANS

THE CHAIRMAN: Are we going to hear from you, Mr. Evans?

MR. EVANS: May it please the Commission, before I begin my argument may I say that for the convenience of the Commission we have supplied a consolidation of the amendments that have been proposed by the parties represented before you. May I say with regard to that the only amendment which is not reproduced is the last one introduced by Mr. Smith during his argument. You may remember he substituted a new one. The Commission will find that our consolidation does not include it. We have also reproduced some of the allied sections because we thought that some of the sections could better be understood by reference to other sections, although we have not reproduced any large number of them. May I begin my argument, as Mr. Carson did, with some general observations.

First, I feel that I owe it to myself and to the Commission to say that we on the Canadian Pacific side find ourselves unable to present to the Commission the thoroughly complete and orderly argument which the size of the record and importance of the matter justifies. With the pressure that has been on us here and before the Board of Transport Commissioners we have not had time to study the entire record nor have we had the staff or the time to have it adequately summarized.

The Commission will recall that I ventured to suggest on one or more occasions that the matter of

amendments to existing legislation might better be left in abeyance for two reasons. One was that normally it is a much easier and more satisfactory matter to discuss before your Commission matters of principle, leaving the drafting of any legislation to be done after the recommendations of your Commission have been made and after the Government shall have decided whether or not such recommendations are to be carried out. The second reason is that the draftsmanship of changes in legislation is a very special science and would normally be dealt with by those in the Government service who are experienced and skilled in that line of activity. If that were done, one could at that time deal with legislation as drafted knowing that the draft represented the Government's view as to what legislation it felt was necessary.

It will be utterly impossible for us to do justice in argument to all the problems with which we have been confronted.

My purpose in mentioning that at this stage is that some of these amendments reached us approximately two weeks after the last date fixed by the Commission, and that last date came during the period of preparation. One of the amendments, that proposed by Mr. Brazier was proposed by him in his argument after we had telegraphed him asking for amendments within the time suggested by the Commission. Having had no reply from him we knew nothing of his amendment until he was on his feet.

I trust, also, that your Commission will understand that if we do not deal specifically with many of the suggestions which have been made to your Commission, we are not to be taken as acceding to them. We do not give our blessing to anything by our silence nor do we necessarily condemn anything by our silence.

My second general observation is that your Commission's activities and its report after the conclusion of the hearings and argument, will, in my respectful submission, serve to bring into clear focus the causes of and remedies for the unfortunately bitter controversies centering upon the matter of freight rates in this country for the past several years.

I use the word "unfortunately" because I believe that while some controversy is inevitable and indeed a healthy condition in any democratic country, it ceases to be healthy or helpful if it becomes so bitter that the parties to it cannot get down to fundamentals. If this happens, as I think clearly has happened, it is impossible to find and apply the solution which will serve to bring such controversies to a satisfactory end. This, then, is the hope of Canadian Pacific in all humility that the disputes which have centered about the matter of freight rates can be reduced to their simplest principles and result in a better understanding of the problem and of its solution.

Thirdly, as Mr. Carson has pointed out in his opening argument, this proceeding is in a very real sense one in which the private ownership and operation of railways in this country is on trial. I do not suggest, nor did Mr. Carson suggest, that there is any general acceptance of the proposal that Canadian Pacific as a privately-owned enterprise has failed and that it should become publicly-owned, nor do I suggest that the proposals which have been made to your Commission are necessarily made with this in view as their direct object. I do suggest, however, that this would be the inevitable result of some of the proposals.

I shall examine some of these suggestions in greater detail at a later stage of my argument. Mr. Carson has dealt with the question of the appeal to the Governor in Council under Section 52(1) of the Railway Act.

There are two other aspects of the representations to your Commission which constitute in our view a substantial threat to the maintenance of the Canadian Pacific as a privately-owned railway company. These subjects are (a) the proposed amendments to Section 38 and 52 of the Railway Act as put forward by Manitoba and (b) the matter of the recapitalization of the Canadian National.

I shall examine these specific proposals in more detail but I pause to point out that they have been made by those who express the view that it is desirable that Canadian Pacific remain as a private enterprise. I shall attempt to show that the proposals made are incompatible with that result.

I shall ask the Commission to examine the amendments to Sections 38 and 52 as proposed by Manitoba in the most critical way.

In this connection, your Commission will bear in mind that while Manitoba has stated that the power of the Government to intervene should be limited to matters which are consistent with the Railway Act and to matters of policy, the amendment to Subsection (1) of Section 52 contains no restriction whatever.

My observation is this -- that it will become necessary at a very early stage of your deliberations to decide whether, as a matter of principle, it is desirable that Canadian Pacific, should be privately-owned and whether the advantages of private ownership are sufficiently strong to warrant rejection of all proposals which will make it impossible.

In my submission there is no really serious contention contrary to the basic assumption contained in paragraph 4 of the Brief of Canadian Pacific that it should "continue to function as a privately-owned system."

It therefore follows that your Commission may, and indeed I submit should, make its finding on the evidence that the assumption referred to in paragraph 4 of our Brief is sound and should be controlling.

(Page 23086 follows)

Unless this decision is taken in advance and kept clearly in mind throughout, it is, I submit, possible to overlook the consequences of measures submitted in good faith for the alleviation of so-called grievances. My submission therefore begins with this -- that your Commission should first place in the forefront of its thinking the necessity for measuring and weighing its findings so as to ensure that just grievances be remedied in such a way as to avoid doing violence to the basic principle that the remedy must not be such as to destroy the Canadian Pacific in the process.

Fourthly, we are living in an era in which even those who express a belief in democracy and all that it entails are inclined to be critical of established institutions. That in itself is good. I am not one of those who believes that because something is old it therefore must be right. I do believe that something that is old and has been tried ought not to be discarded merely because it is old.

I believe and my Company believes that, fundamentally, experience is the best of all guides as to what is proper for the future. In matters of regulation of railways one must, I submit, realize that nothing is perfect nor can anything which is human be perfect. We cannot avoid complaints except by suppressing the right to make complaints and that is not compatible with democracy. The surest way, in my submission, of avoiding complaint, particularly of the kind with which the railways have been faced in the past few years, is a rebuilding of our faith and a determination to see that our machinery of regulation is so fair and so completely impartial as to convince even the doubting that decisions will not only be impartially made but that they will be recognized as impartial by all those whose

interests are involved.

Where then is the middle way between the adherence to the tried methods of the past and a desire to improve upon those methods which the present and the future may require?

Your Commission will primarily have to decide in this proceeding what, if anything, is wrong with the system of regulation of railways and their rates. Such a consideration involves two questions: (a) whether the Railway Act is deficient and requires amendment, and (b) whether the tribunal, whose duty it is to administer the scheme of the Act, is failing in its duty or is inadequately staffed or has too much or too little power to administer it satisfactorily.

The distinction between these two things is of fundamental importance. The Railway Act is the product of Parliament acting over the years in relation to problems which gave it birth and those problems which have arisen since the Act was first passed.

The Board of Transport Commissioners, on the other hand, is a body of individuals appointed by the executive arm of government, that is the Governor-in-Council under Section 9 of the Act.

Fifthly, from this point, I submit, your Commission should then turn to an examination of the complaints which have been presented to you and to determine what the complaints really are; whether they are of substance and what is the remedy.

Many of them are capable of adequate remedy under existing legislation and procedure while others are really born of a fear that something less than justice will be obtained if the complaints are submitted to the Board set up under the Railway Act to administer the Act and to

hear these complaints.

I now turn to my first subject which I have entitled:

THE THREAT TO PRIVATE OWNERSHIP OF THE CANADIAN PACIFIC.

The first subject upon which I direct my attention is the threat to private ownership of the Canadian Pacific. Only Prince Edward Island makes specific recommendations for the amalgamation of the two principal railway systems under public ownership. In the case of Saskatchewan, while its brief contains merely a suggestion that the matter of public ownership and amalgamation might be considered as a solution to the railway problem, the argument of Mr. Cronkite leaves no doubt that the real position of Saskatchewan is in favour of policies which cannot have any other result than public ownership of the Canadian Pacific.

With these exceptions, the governments of the provinces represented before your Commission, as well as the individuals and commercial groups who have appeared, make it clear that they believe firmly in the principle of private enterprise.

Not only have most of the proponents of changes in the Railway Act protested their belief in Canadian Pacific remaining as a private enterprise but also the Canadian National, in offering its recapitalization proposals through its witnesses Mr. Cooper and Mr. Fairweather, has expressed the firm view that the Canadian Pacific should remain in private hands as a competitor for the publicly-owned Canadian National (Mr. Cooper at p. 18918 personally and as an officer of the Canadian National, but not official view necessarily of Canadian National. Mr. Fairweather at pp. 20246, 20250-1).

There is much danger, however, in accepting protestation of belief in private enterprise while ignoring the implications of the proposals made by those who express such beliefs.

A case clearly in point is that of the Province of Manitoba whose brief was presented by Mr. Moffat. At pages 8466 and

8467, Volume 44, Mr. Moffat read from the Brief of Manitoba in which the view was expressed that "we are strongly of the view that the Canadian Pacific Railway should continue to operate as a privately-owned system...we feel that administrative efficiency, operating efficiency and service to the public will all be maintained at a better standard if Canada continues to have two competing major railways, one privately owned and one owned by the Dominion Government."

In his cross-examination beginning at page 8856, Volume 46, Mr. Moffat was asked whether if Manitoba's proposals would result in a tendency to socialize the Canadian Pacific, he would choose between carrying out Manitoba's proposals and the alternative of Canadian Pacific^{ic} remaining as a privately-owned enterprise. At the top of page 8858 Mr. Moffat gave the following answer: -

" Well, personally, if you want a personal opinion, it is in favour of private enterprise wherever possible. As far as instructions from government are concerned, I have no instructions on the extreme choices either way.

Q. So that if it came to a choice, your personal choice would be for the private enterprise aspect of the question?

A. Yes. "

On the same page Mr. Moffat was asked to say whether if he had to make a choice between carrying out Manitoba's proposals for regulation and the right of the Canadian Pacific to earn a sufficient return to maintain itself as a private enterprise, what that choice would be. The following question and answer on this page make his position clear.

" Q. Just so that there may be no misunderstanding between us, your choice in that case would be the choice that Canadian Pacific should have adequate income?

A. Yes."

(Page 23091 follows)

We thus have the Province taking the position officially in its brief and its witness expressing a personal opinion that the Canadian Pacific ought to be maintained as a privately owned system and you have Mr. Moffat's personal view that if it comes to a choice between regulation as proposed by Manitoba and a privately-owned Canadian Pacific, he would choose a privately-owned Canadian Pacific.

It is therefore extraordinary to find counsel for Manitoba in his argument stating (p. 69 of the mimeographed copy) that C.P.R. should not and in fact cannot finance its capital requirements in part through the issue of stock. Of course, if it cannot do that it cannot survive. On the other hand (p.70) counsel for Manitoba has no alternative to recommend to your Commission. This position of Manitoba is, I submit, untenable and is out of keeping with its desire to have Canadian Pacific remain a privately-owned railway system.

With the foregoing in mind, it would, I think, be worthwhile to examine the suggestions made by Manitoba in its Brief and which disclose the basic philosophy of Manitoba in the matter of regulation. See pages 9 to 13 of Chapter 2 of the mimeographed copy of the Manitoba Brief (near the end of p. 54 to p. 56 of the printed Brief).

The Commission will observe that the proposals involve regulation containing provision -- and I am merely summarizing this -- for a "larger measure of positive direction"; that the Board should be a policy making body; that no one can accept the proposition that policy decisions in such an important field as this should be final if made by a body other than the Dominion Government; that the body which is to administer the Act must of necessity base its decisions upon consideration of facts which go far beyond

the limits of railway operations as such; and that the Dominion Government should have the "responsibility and the authority to disallow or to vary any order of the Board."

The second thing which is to be noted in this portion of Manitoba's Submission is that at the end of p. 54 of the printed brief Manitoba protests that "we are not unmindful of the fact that the railway companies' right to an 'adequate' scale of remuneration should not be lightly dismissed." -- rather grudging words, I thought -- "To do so would be to do serious harm to the welfare of Canada generally."

COMMISSIONER INNIS: Are those quotation marks correctly placed, Mr. Evans?

MR EVANS: They may not be in the reproduction, but my effort was to have it accurate.

COMMISSIONER INNIS: "Adequate" is a quotation within a quotation?

MR SINCLAIR: Yes.

MR EVANS: Yes, it is a quotation within a quotation in their brief.

From pp. 8875 to 8881 of the transcript (Vol. 46) we determine what he meant in the Brief by the use of the words "a larger measure of positive direction is required". In effect, the Board would be acting as a department of Government.

Having thus dealt in general terms with the principle of the scheme of regulation put forward by Manitoba, it is interesting to see what qualification is attached to the protestation by Manitoba which I have read that it is "not unmindful of the fact that the railway companies' right to an 'adequate' scale of remuneration should not be lightly dismissed. To do so would do serious

harm to the welfare of Canada generally."

The Commission will observe that on p. 8595, Vol. 45, Mr. Moffat was extremely reluctant to express himself clearly on the matter of a reasonable return for the Canadian Pacific. The Chairman put to him what I thought was an extremely reasonable question as to whether in Mr. Moffat's opinion a reasonable return would be the minimum return sufficient to enable the railway to maintain itself as a private enterprise. Mr. Moffat's answer indicated that while the idea put forward by the Chairman's question appealed to him, he would not want the word "minimum" to be defined too precisely.

I would have thought that had Manitoba or Mr. Moffat any view that the Canadian Pacific should have an income adequate to maintain itself as a private enterprise, this could have been conceded without qualification in the form in which the question was put by the Chairman. Quite obviously, if on the one hand, Manitoba desired the Canadian Pacific to be maintained as a private enterprise, it could not do so on anything short of the minimum return which would be found to be necessary for that purpose whatever that might be. However, the real position in which Manitoba finds itself on this question is disclosed later in the cross-examination and particularly beginning near the top of p. 8905 to p. 8913, where Mr. Moffat said that while the Board could not possibly know where the standards of service could be cut, it should, if public opinion requires, tell the railways that they must get along on something less than they need.

Now, I suggest to the Commission that what is being recommended here is in effect contained in the answer given to Dr. Angus at p. 8907, where Mr. Moffat agreed with the suggestion made by Dr. Angus that the Board should determine

not what the railway company needed as a minimum to maintain itself as a private enterprise, but what the people of Canada are willing to pay, and that the railway company should give only such service as it could provide at that price.

COMMISSIONER ANGUS: I might say, Mr. Evans, that that was my suggestion as to what Mr. Moffat himself meant.

MR EVANS: Well, I think that that is the summation of what Manitoba's position really amounts to.

COMMISSIONER ANGUS: Yes; I mean it is not a statement of my position.

MR EVANS: Well, if there is any inference of that kind I would not want it, but I thought what I said here was that it was in effect contained in the answer given to you.

COMMISSIONER ANGUS: Yes -- a suggestion made by me.

MR EVANS: Yes. I did not want to infer that you had had any views or expressed them.

When faced with the possibility that it might be necessary to provide a better standard of service to meet shipper demands or competition, Mr. Moffat's only answer is, in that case, that one might have to consider subsidies.

We thus have Manitoba putting forward as its basic philosophy a scheme of regulation by a regulatory board subject to the direct control by the executive arm of government and proposing that this power of control by the executive arm of government should be a means by which the pressure of public opinion could make itself felt in the decisions of the Board as to the amount of earning power which the Company might be permitted to have in order to carry on its transportation services.

Mr. Moffat is quite clear in his suggestion that public opinion would, through his proposal, have the right at

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any time on an application for an increase in rates, to decide not what the railway company needed in order to carry on its transportation business but what the public is willing to pay for that service and if this resulted in inability to carry on, that government subsidies or guarantees or loans might have to be resorted to.

He admits definitely and clearly that these have undesirable features and that they would tend, as he said, at p. 8860, to provide a threat to the Canadian Pacific remaining as a private enterprise. I should like to read the question and answer on this point at p. 8860:

"Q. I do not want to explore this too much at the moment because I am merely having an introductory discussion with you, but I would like to follow you up on this. If your alternative involves Government loans or Government guarantees for a large capital programme, does it not follow that the deeper the Government gets into the Canadian Pacific the greater the threat to the Canadian Pacific remaining as a private enterprise?

A. Yes, certainly."

(Page 23097 follows)

Moreover, throughout his cross-examination, Mr. Moffat, quite apart from the question of minimum earning power, recognizes that his proposal for intervention in the activities of the Board by the executive arm of the Government has undesirable features. For example, at page 8877, when asked by Dr. Innis how the Board could be protected from the possibility of increased political pressure, his answer : "was merely that while that created a problem, the alternatives created even greater problems. In this way Mr. Moffat is, in effect, saying to your Commission that the Railway Act and its administration by the Board of Transport Commissioners today has not given Manitoba what it wants, therefore, one must condemn the present system and go for one which may result in the socialization of the Canadian Pacific through political pressure upon the Board. Manitoba's proposal stands quite clearly as an attempt to regulate railways solely on the test of popular or public opinion and Mr. Moffat says that this proposal is to be preferred to the alternative. What the alternative is, Mr. Moffat does not say, but we must conclude that the alternative which he finds less desirable is the system of regulation under the present Railway Act.

I say to this Commission in all seriousness that this attitude of Manitoba as expressed by Mr. Moffat in his evidence is almost fantastically inconsistent and exaggerated. The substance of Mr. Moffat's evidence under close examination by the Commission and by counsel is clearly that the Board of Transport Commissioners is to become a department of the Government and that the privately-owned railway company is to have its financial needs dependent upon public opinion as developed from time to time. I say to this Commission that it is quite

clear that such proposals could, if given effect to, lead only and inevitably to the socialization of the Canadian Pacific.

The Commission will see why I first directed its attention to the statements made in the Manitoba Brief and early in the cross-examination of Mr. Moffat, where the Brief speaking for Manitoba, and Mr. Moffat, expressing his personal opinion, indicated a strong belief in private ownership for the Canadian Pacific. I say to this Commission that when the proposals are actually examined, there cannot be detected even the slightest real desire on the part of Manitoba to do anything to make possible that which it claims to support.

The Commission apparently had in mind the rather extraordinary nature of the submissions made by Manitoba in this connection because at one stage it asked Mr. Shepard to obtain instructions as to whether Manitoba really intended to support proposals which would in effect restore regulation of railways by the Government of Canada as it existed prior to 1903 when the present Railway Act was passed and the Board of Transport Commissioners established .
(see pages 9565-6-7, Vol. 50).

Mr. Shepard accordingly obtained instructions which he communicated to the Commission on December 15 last (See page 13838, Vol. 67). The substance of Mr. Shepard's instructions is contained in a short paragraph on that page as follows:-

"I am instructed to state that this position was reviewed at a meeting of the Manitoba Cabinet on November 26, and the position has been confirmed."

However, on the following page the matter is

rather confused, and I would like to read a short paragraph from there:-

"In short, it is Manitoba's submission that the Board should be strengthened so that it is better able to formulate and administer national railway transportation policy but the Dominion Government should be empowered to direct the Board in any case where it may consider it necessary to do so in the interests of national economic policy. The power suggested to be vested in the Dominion Government to direct the Board would be limited as follows."

In effect, the power suggested to be vested in the Dominion Government to direct the Board was to be limited to three matters:-

"(1) Direction could not be inconsistent with the Railway Act;

(2) Direction should be on policy matters only;

(3) Government control over the disposition of any particular issue properly before the Board to be that suggested by Manitoba as an amendment to Section 52(1) of the Railway Act.

I suggest to the Commission that Manitoba has not yet made its position clear. Either it confirms or does not confirm the position taken by Mr. Moffat in the witness box.

It is to be noted that the power of the Government to direct the Board is not to be inconsistent with the Railway Act and that direction should be on policy matters only.

When one examines the amendments suggested by Manitoba one finds almost unlimited power of direction by the executive arm of Government. The amendments to Section 33 relieve the Board from any obligation to be bound by any previous decisions, procedure or practice.

THE CHAIRMAN: Mr. Evans, we had better have a look at the amendments.

MR. EVANS: I am not really stopping to examine them.

THE CHAIRMAN: Are you coming back to them?

MR. EVANS: I am going to examine 38 and 52. This is merely a general discussion of the character of these amendments.

THE CHAIRMAN: You are coming back to deal with them?

MR. EVANS: Well, I have nothing particular to say about Section 33 at this stage.

THE CHAIRMAN: You are undertaking here to say what they mean.

MR. EVANS: Well, I will deal with 33 now, if you like. I have some place in my notes a discussion of 33, but what I am saying there is that - -

THE CHAIRMAN: Where is this proposed amendment to Section 33 in this summary?

MR. EVANS: It is sub-section (6) of 33. It is to become sub-section (6) on page 3 of the consolidation. I am not going to attack the language; I am merely going to attack the principle.

THE CHAIRMAN: You say it is on page 3 of your consolidation?

MR. EVANS: Consolidation, yes.

THE CHAIRMAN: At the bottom?

MR. EVANS: Yes, you will see it has been

underlined indicating an amendment and in the margin is "Manitoba".

THE CHAIRMAN: Yes.

MR. EVANS: The sum and substance of that is to say that the Board is an administrative tribunal and it shall not be bound in any way by its previous decisions, procedure or practice.

The Board is not, of course, bound by previous decisions as the law now stands. One feels, however, that an express revision in the Statute could be the basis upon which it could be argued that the Board not only need not be bound but must not consider itself bound by previous decisions.

THE CHAIRMAN: Well, you go on to say yourself that the Board, of course, is not bound by previous decisions as the law now stands.

MR. EVANS: Yes.

THE CHAIRMAN: So that this proposed amendment would not change that?

MR. EVANS: It is perfectly useless so far as I am concerned, and I would like to examine that a little more when I come to discuss Mr. Moffat's rather mistaken view as to the necessity for it. I was not going to do it in this context, because that is in another point.

THE CHAIRMAN: Well, according to your own choice and time.

MR. EVANS: Under the proposed sub-section 7 there is really nothing added to the power of the Board, that is to say, it "is not to be bound by the legal and technical rules of evidence, nor shall it be restricted to making a decision based only upon the evidence taken

at the hearing." 'That is perfectly unnecessary. They have never been bound by the technical rules of evidence, nor have they restricted themselves to the evidence actually before the Board.

THE CHAIRMAN: Well, at the same time, it has been urged upon us from other places than Manitoba that the Board has taken the attitude: "Well, neither side presented an argument about this or any evidence about this, and therefore we have to take the evidence that we have". The point is, I suppose, that the Board should not take that sort of attitude; it should not feel itself bound by whatever evidence the parties laid before it. That leads, I think, principally to a request that the Board be fortified by the assistance of experts and statisticians and others who could find all the evidence surrounding the question which had to be before it, before the Board itself, without having to rely upon what the parties bring before it. I think that the Board in one of these cases went pretty near to saying that.

MR. EVANS: Well, they may have said that, Mr. Chairman, - -

THE CHAIRMAN: Wasn't it in the 21% Case?

MR. EVANS: No, they didn't say that at all.

THE CHAIRMAN: Not there?

MR. EVANS: No, sir. It has been argued, I think, that they did in ^{effect} say that. Now, I am going to examine that. It has been argued that that is the effect of what they said. My submission is that that simply is not true. They did not consider themselves tied.

THE CHAIRMAN: Have you the reference to where they did make a statement?

MR. EVANS: I have built up my argument in my

notes. Whether I could find it at a moment's notice, I don't know.

THE CHAIRMAN: I am not asking you to bring it now. I thought myself that you went on to read a statement by the Board that there was room for improvement in the Board's procedure.

MR. EVANS: Well, I am not saying there is not room for improvement.

THE CHAIRMAN: I mean, in that particular direction.

MR. EVANS: All I am saying is that the Statute now gives them exactly this power that is under sub-section 7.

THE CHAIRMAN: Yes, but it may be that they do not interpret the Statute the same way as you do.

MR. EVANS: I can point to numbers of cases where they have made these studies on their own, and I am going to show later, while dealing with maintenance, that they have in fact made a study.

THE CHAIRMAN: Well, we must not overlook it, that is all.

MR. EVANS: No, sir. I have said that in my opinion this sub-section 7 is unnecessary, and I develop it.

However, the nub of the proposed amendments is contained in the subsection to be added to Section 38 and in the amendments to sub-section (1) of Section 52. The amendment of Section 38 is expressed in the following language. You will find that on page 4 of the consolidation. You will see sub-section (2) of Section 38 and opposite in the margin "Manitoba". That indicates that an amendment has been proposed by Manitoba. Sub-section (2) says:-

"The Governor-in-Council may also give general directions to the Board in respect to the policy to be followed by the Board in the exercise of its jurisdiction under this Act."

This is clearly limited to general directions as to policy and could cover an almost unlimited right of the Governor-in-Council to guide the Board in the exercise of its functions. This is an exceedingly dangerous proposal.

THE CHAIRMAN: I think we did discuss with Mr. Shepard the lack of precision in the language owing to this word "policy" being inserted.

MR. EVANS: Well, you see, whatever may be said about the precision of language, Mr. Shepard went on to say two things. He wants the general power of the Governor-in-Council to control the Board, and he also wants the specific power. Sub-section (2) of 38 and his amendment to 52(1) together make the Governor-in-Council the controlling influence over the Board's activities in every respect. Now, I have quite in mind the point that your lordship raised yesterday which you asked me to mention, and I am coming to it right away.

THE CHAIRMAN: Well, in any event this first amendment would give to the Governor-in-Council power to give general directions to the Board in matters of policy?

MR. EVANS: Yes.

THE CHAIRMAN: That is as far as we can go.

MR. EVANS: Now, I am not concerned with the actual language used except this, that there is a principle there, that in matters of general guidance

the Governor-in-Council can dictate policy to the Board. Now, policy was a subject of discussion yesterday. My view about policy is this, that the Board does not exercise policy in the broad sense of deciding the policy of Parliament, but obviously the Board acting within the framework of the Railway Act must have some policy of its own even if it only gets down to procedure or policy that they have developed by a process of a number of decisions -- there is some policy there.

Now then, I don't think that the use of the word "policy" in sub-section (2), that is to say where the Governor-in-Council may dictate policy, would be a policy to supplant the policy of Parliament. It would be that the Governor-in-Council could say that in all those matters which are policy of the Board under the Railway Act, under the scheme of regulation, the Governor-in-Council could control the exercise by the Board of that line of policy.

(Page 23105 follows)

THE CHAIRMAN: Dealing with that what weight, if any, would you give to the directions under our Order in Council, Section 2(b), where we are asked to review the Railway Act with respect to such matters as guidance to the Board and recommend such amendments therein as may appear to be advisable.

MR. EVANS: My first view is that unquestionably it involves amendments of some kind to the Railway Act.

THE CHAIRMAN: Statutory directions.

MR. EVANS: I think so.

THE CHAIRMAN: Not cabinet directions.

MR. EVANS: Yes. You will notice the language, my lord, it is to review the Act with respect to such matters as guidance. I am going to argue that at a later stage. As a matter of fact, I have a whole section on the matter of guidance, and I am going to point out the evils that are attendant upon the attempt to give statutory guidance to an administrative tribunal whose functions are largely intended to be discretionary, because that is why it is called an administrative tribunal. If your lordship will permit me, I should like to reach that in the sequence in which I have it set out.

Turning from Section 38, subsection 2, to an examination of Section 52(1), as to specific matters, the power of the Governor in Council is extended by the proposed amendment to Subsection (1) of Section 52 under which the Governor in Council may "remit any matter to the Board with directions , respecting the disposition thereof".

Your lordship will find Section 52 with Manitoba's amendments at the bottom of page 5 of the consolidation, and for convenience we have shown the words that are omitted and underlined the words that have been added. It thus appears that the Governor in Council in regard to

any particular case, either on petition or on its own motion -- and I ask the Commission to understand this can be done on the motion of the Governor in Council. It is true it is in the present section but it is an extraordinary thing that this power as it now exists and the power which is now proposed may be exercised by the Governor in Council on its own motion.

Thus the Governor in Council in regard to any particular case, either on petition or on its own motion, may direct the Board as to how it shall dispose of a matter which it has already, as a Board, disposed of and its orders so made are to be binding upon the Board and all parties.

I have in mind that your lordship rather suggested to Mr. Carson yesterday that there must be some limitation on the power of the Governor in Council even under the present section. I will agree that of course is not a question that is clear for everybody.

THE CHAIRMAN: I was not deciding it.

MR. EVANS; No, I think you were putting it to us to give an opinion, and I am qualifying the opinion I am giving to you by saying it is not free from doubt. The first proposition I would make about that is that the Board's powers are substantially discretionary powers. Now then, if the Governor in Council is to have the right after the Board has exercised its discretion to direct the Board by its remission to dispose of it in some other way, then quite obviously the discretion of the Board is cast aside in favour of the discretion of the Governor in Council. That is the first proposition.

The second proposition is this. Let us assume that the Board should say that the increase should be 25%. This is one of Mr. Moffat's propositions. The Governor in

Council might remit it to the Board and say it should be 15%. There is a clear case where the Board, having heard evidence to which it applied its judicial mind and to which it applied perhaps to some extent its discretion, would be directed to make an order awarding 15%.

It is possible to conceive that in such circumstances -- in the United States, for example, it might be held that the awarding of a 15% increase in lieu of a 25% increase could be considered confiscatory.

THE CHAIRMAN: Under the constitution.

MR. EVANS: Yes. Now then, there is no real distinction in this country between here and the United States except the power of the legislature. Once a statute such as our Railway Act sets out that there shall be some compensation for railways carrying out a service, there is no real distinction except that if the legislature wants to change that Act to make it clear that it can confiscate. That is the only distinction between here and the constitutional problem in the United States.

The question that I am putting to the Commission is this. If it can be demonstrated that what the Governor in Council did was in effect confiscation what would be the answer? Frankly I do not know, but there is no appeal from the Governor in Council, and I am certainly in doubt whether, if the Governor in Council remitted the matter to the Board and said "Your decision should have been 15%; it must be 15%", whether we would have any appeal from the Board to the Supreme Court.

We could hardly say that the Board had made a mistake in law because the section as drawn says that the remission with directions is binding upon the Board and on all parties. I suggest that on balance this remission to the Board with a direction as to what the Board shall decide,

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and that direction being binding upon the Board and all parties, amounts closely to legislation which is specific enough to warrant an opinion that in a case of that kind where it really might amount to confiscation there might be a real argument that that section could go that far. It is binding upon the Board and upon all parties. I will not go further than that.

THE CHAIRMAN: The point I was trying to stress yesterday is this. Under the present legislation the Governor in Council can do practically anything he thinks ought to be done or he thinks one ought to have done. Without any petition the Governor in Council may vary or rescind any order, decision, rule or regulation of the Board, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order which the Governor in Council may make with respect thereto shall be binding upon the Board and upon all parties.

MR. EVANS: Yes.

THE CHAIRMAN: When the amendment suggests that the Governor in Council may remit a matter to the Board with directions to change their former decision, they are simply asking the Board to do what the Governor in Council could have done without remitting it to the Board at all. Do you think there is any real difference?

MR. EVANS: I think there is a very great practical difference.

THE CHAIRMAN: You think so?

MR. EVANS: Oh my, yes, with respect.

THE CHAIRMAN: For instance, in the case you gave, the Board found that the railways should have an increase in freight rates of 25%.

MR. EVANS: Yes.

THE CHAIRMAN: And the government decides that must be reduced to 15%. They could make that effective themselves. They do not have to send it back to the Board.

MR. EVANS: In that particular case I think they could.

THE CHAIRMAN: If, instead of making that effective themselves they ordered the Board to alter their decision by reducing the increase from 25% to 15%, what effective difference is there between the two procedures?

MR. EVANS: It seems to me to be largely a practical difference.

THE CHAIRMAN: Practical?

MR. EVANS: Largely a practical difference because the Orders in Council which emerge under the provision to vary or rescind to be strictly proper have got to vary or rescind. They cannot issue directions. If they vary or rescind --

THE CHAIRMAN: I am asking you what danger there is.

MR. EVANS: I was just trying to answer you. If they vary or rescind they have taken positive action which I suggest they would be very loath to take with the limited time they give to these matters with the enormous records they have, but they might come back and issue a direction to the Board such as, for example, Mr. Moffat proposed in his evidence. The people of Canada cannot afford a 15% increase. They remit to the Board and say that we are not going to vary or rescind your Order but what you should do is that you should cut the standard of service to be provided by the railways so that 15% will do.

As a theoretical thing it is perhaps a little thin but as a practical thing it seems to me where they would vary or rescind they have got to take positive

action to change an order. They very seldom do it. To my knowledge they never have done it but if they can remit with directions and those directions are binding think what might have happened in the 21% case. If the Board had been bound by the directions in order in council P.C. 4678 the Board would have been bound by law to apportion railway depreciation partly among railway and partly among Other Income assets. They would have been bound to apportion income tax, which had already been apportioned, legally bound to do so.

The Board is bound by these directions. As a practical matter they make seek to deal with their present powers by way of direction and they have done so but those directions are not binding upon the Board. They may be an invitation to the Board to give consideration to other things but once you make the direction binding it has the force of law.

I am saying that while theoretically the difference is as close as may be, as your lordship puts it, the practical difference is a very, very substantial one, and it goes to the root of the ability of the Governor in Council in the time it has before it to go through the record and understand what it is doing. If it starts giving directions then those directions are binding, and as we have seen they made directions which, if they had examined the record, they could not possibly have made.

THE CHAIRMAN: On this question of remitting to the Board, do you see anything in Section 52, Subsection 1, which provides for that being done at all?

MR. EVANS: No, and we argue --

THE CHAIRMAN: That is what I say. Section 52 says what the Governor in Council may do.

MR. EVANS: Yes.

THE CHAIRMAN: We must all admit they are very wide powers.

MR. EVANS: I think far too wide.

THE CHAIRMAN: They may vary, alter, and so on. There is no specific power given there to remit to the Board.

MR. EVANS: No, sir.

THE CHAIRMAN: And yet the Governor in Council does remit to the Board.

MR. EVANS: Yes.

THE CHAIRMAN: I do not think you would dispute the right of the Governor in Council to remit to the Board.

MR. EVANS: We did in the last case suggest to the Board that the directions of the Governor in Council, which were urged very strongly by the respondent provinces, were not binding on the Board.

THE CHAIRMAN: You urged that?

MR. EVANS: Oh my, yes.

THE CHAIRMAN: The Board seems to have held with you, as I remember.

MR. EVANS: That was in the 8% case. The majority judgment merely avoided the point by saying that the Board had power to reconsider and reopen on its own account. You will find that at the bottom of page 2.

THE CHAIRMAN: Yes, I remember that now.

MR. EVANS: That is the 8% judgment of September, 1949. However, I think the Assistant Chief Commissioner in that judgment rather upheld the view that we expressed.

It says at page 17 of this same pamphlet copy of the judgment of September 20 --

THE CHAIRMAN: That is in a minority judgment.

MR. EVANS: That is a minority judgment. He dealt with the point we argued. The majority judgment did not deal with it. It simply said that the Board exercised its powers to review generally under the Act. But at page 17 I see a paragraph beginning near the top of the page which reads:

"The Governor in Council did not exercise his powers of varying or rescinding but allowed the award of 21% to stand. The Governor in Council did, however, by Order in Council P.C. 4678 dated 12th October, 1948, refer back to the Board for consideration the complaints of the appellant provinces for review by the Board."

That point was argued at some length.

THE CHAIRMAN: What I had in mind is this. In answer to Manitoba's request for this amendment, it might be said: "Why go through the procedure of sending it back to the Board with a direction to do so and so when the Governor in Council can do so and so without directing the Board? To you it is the same thing. What difference does it make whether the Governor in Council does so and so or whether he sends it back to the Board and tells the Board to do so and so?"

MR. EVANS: As a practical matter --

THE CHAIRMAN: Is the effect not the same in both cases?

MR. EVANS: No. The theoretical effect is the same; I agree with your lordship on that. But the practical effect is very different; because, the theoretical effect having been what your lordship says, the difference is

shown by what the Board did under P.C. 4678. Because if they had been legally bound to carry out the express instructions under P.C. 4678, they would have had to do something which was utterly wrong. The only thing we could have done was to have some appeal from this, an application to the Governor in Council to have this order revised; because in the result, the Board was directed to do something which nobody even suggested for one moment it should be directed to do, even by the respondents. I am saying that as a practical matter, they should never go any further than they are now. Of course I am saying this. I look upon the crux of the Canadian Pacific case to your Commission as resting on the repeal of Section 52, sub-section 1, as put forward by Mr. Carson. I think that section in the Act, in the light of what we have seen in the past three or four years, is a greater threat to the maintenance of the privately owned railways in this country than anything that could possibly be proposed. I cannot be too earnest when I say that I look upon the removal of section 52, sub-section 1, as of absolutely paramount importance. All I am arguing now is that ^{as to} the powers that are there, it is now sought to add greatly to them, and as a practical matter, to remove and to substitute for the discretion of the Board, the discretion of the Governor in Council to a far greater extent than it now exists.

THE CHAIRMAN: Would you say, Mr. Evans, that Section 52, sub-section 1, gives the Governor in Council power to do anything that the Board might do, insofar as making an order is concerned?

MR. EVANS: No.

THE CHAIRMAN: It says that the Governor in Council may vary or rescind any order ^{or} decision. That is to say, the Board must first act.

MR. EVANS: Yes. I think that is the big distinction.

THE CHAIRMAN: I know. But I say that the Board must first act. Then the Governor General, in reviewing the action of the Board as expressed in an order, decision, rule or regulation, may alter it, rescind it, or otherwise dispose of the matter, I think it says.

MR. EVANS: Yes; to vary or rescind as it likes. The Board may review, rescind, change, alter or vary..

THE CHAIRMAN: Yes. Is that not a very wide jurisdiction?

MR. EVANS: Oh, yes.

THE CHAIRMAN: At present. Does it not practically enable the government to do anything, once a matter is properly before it, which the Board might have done in the first instance?

MR. EVANS: I think that is the theoretical result.

THE CHAIRMAN: Would you not agree with this, that in so acting the government must itself keep within the Act?

MR. EVANS: I put to your lordship just a moment ago my view on that. I said I did not like to go too far on that; but I should like to go this far, ^{and say} that in the language used the order which the Governor in Council may make with respect thereto shall be binding upon the Board and upon all parties. I gave the example where you might have a confiscatory order of the Governor in Council. There is no appeal from that. They remit it to the Board and they say, "This is our order." There is no appeal to the Supreme Court from that order. Since that is binding upon the Board and upon all the parties, I am not so sure that it does not go farther than your lordship suggests.

THE CHAIRMAN: Suppose it is a question of fixing tolls.

MR. EVANS: Yes?

THE CHAIRMAN: And the Board has come to a certain decision and issued an order about certain tolls.

MR. EVANS: Yes?

THE CHAIRMAN: And there is an appeal to the government.

MR. EVANS: Yes?

THE CHAIRMAN: The government then is deciding what it ought to do about these tolls.

MR. EVANS: Yes?

THE CHAIRMAN: The Act has an express provision, for instance, that no tolls shall discriminate between localities.

MR. EVANS: Yes.

THE CHAIRMAN: Would you say then that the government could disregard that part of the Act and authorize tolls that would discriminate between localities?

MR. EVANS: I am afraid so. I think it is at least arguable, and strongly arguable. I have that as a further example, that if a rate were held by the Board to be discriminatory.

THE CHAIRMAN: If the government could do that in fixing tolls, they could override the provisions of the Act.

MR. EVANS: I am afraid they could.

THE CHAIRMAN: There is a point there.

MR. EVANS: With respect, I submit that that section is an absolutely vicious section even as it now stands; and it would become far more vicious with the amendments proposed by Manitoba.

THE CHAIRMAN: Perhaps we had better continue.

MR. EVANS: Then if I may proceed, I was in the middle of page 15 of my notes.

It therefore appears that while Mr. Shepard's statement in terms indicate Manitoba's intention that the directions to be given by the Governor-in-Council should be on policy matters only and should not be inconsistent with the Railway Act, the actual amendments proposed go much further and give the Governor-in-Council complete power to deal not only with general matters of policy but also to remit any matter to the Board with directions as to how the Board shall deal with it. There is nothing whatever in this language which in any way restricts the power of the Governor-in-Council to any principles whether of policy or otherwise in remitting matters to the Board with such directions.

It is therefore my submission that Manitoba adheres to its original position in its Brief in every respect so far as these submissions relate to the power of the executive arm of government to deal with matters coming before the Board of Transport Commissioners. My earnest submission to your Commission is that to all intents and purposes the Board of Transport Commissioners would, under the proposals as now made, become merely the agency of Government and, in effect, a government department to administer the Railway Act in exactly the way in which Mr. Moffat in his evidence had in mind. I suggest to this Commission that this is, in effect, equivalent to regulation of railways by a committee of the Cabinet in a way that is quite as open to political interference as would direct regulation by the Cabinet itself. I say this is a retrograde step of the worst kind. I say without fear of being charged with exaggeration that if these amendments are put into effect, one might just as well decide here and now to have

public ownership of all railways in this country established as the policy for the future.

I cannot read these things apart from Mr. Moffat's evidence; because Mr. Moffat had certain things in mind that the government should yield to popular clamour on, and he has made it a little easier. That is why I think it is not an exaggeration to say that that spells the death knell, carried out as Manitoba has through Mr. Moffat proposed it should be carried, of private enterprise in railways in this country.

I say to your Commission in all sincerity that it would have been better and much more clearly understood if Manitoba had made these suggestions with the avowed purpose of supporting public ownership and not in favour of private ownership of the Canadian Pacific Railway Company. One would then have had no doubt where Manitoba stood on the subject.

The danger in the proposals now advanced is that it puts forward proposals of this kind under protests of a belief in private ownership in a way which may result in a lack of understanding of the true result which will flow from its proposals. One respects submissions which are made with a clear-cut purpose in mind. I may be forgiven if I say that I cannot respect proposals which on the one hand protest the belief in one principle but which, in effect, will result in the destruction of that principle. I therefore ask your Commission to reject utterly the philosophy of Manitoba and that of its witness Mr. Moffat.

More specifically I ask your Commission to reject completely the amendments of Sections 38 and 52 as proposed by Manitoba.

The second of the two matters which have a bearing on the question as to whether the Canadian Pacific is to be allowed to remain as a privately owned railway -- i.e.

the Canadian National recapitalization proposal, I shall deal with at a later stage of my argument.

I want just to turn to a general argument which was only touched upon by Mr. Carson but which I should like to develop a little more particularly under the following heading:

THE BASIC CHARACTER OF REGULATION

My argument on this subject will concern itself largely with general principles. Those who follow will direct their attention to the more specific matters advocated by the various parties appearing before your Commission.

In this connection I shall refer to the following matters:-

- (a) The need for regulation;
- (b) The principles which should be applied;
- (c) The nature of the tribunal;
- (d) The principal complaints;
- (e) The means by which the remedy, if any is required, should be achieved.

(a) The Need for Regulation.

Canadian Pacific recognizes by Paragraph 5 of its Outline Submission, - that is at page 2 of Part 1 - that regulation of public utilities, including railway companies, is necessary but that regulation should not be sought for its own sake nor should it be carried to the point of oppression.

I am going to suggest at a later stage that here we have had legislation sought for its own sake. We have had a succession of people coming forward to your Commission or counsel coming forward to your Commission and saying, "We think the power is there but we would like to see it in the Act." That is what I mean by "regulation for its own sake."

A similar view is expressed in Paragraph 75. In that paragraph it is submitted that the proper limits of regulation are a matter of fine balance between necessary protection of the public interest and undue interference in functions of management. The view is also expressed in that paragraph that the trend should be towards less rather than more regulation of railways, because of the increasing strength of other media of transport competing with the railway industry.

At p.143 of Part I of the Submission the following paragraph appears:-

Mr. Carson touched on that, and I am going to read only the first sentence.

"So long as a traveller or a shipper had a choice between using his own vehicle or that of a common carrier, whether the movement was by road or through coastal or inland waterways, there was no need for Government interference with the functions of management of a common carrier. The development of the country where goods were required to move relatively long distances inland, even before the advent of railways, was putting a strain on the concept of the shipper's or traveller's freedom of choice between his own vehicle and that of a for-hire carrier. The introduction of railways as a means of carriage brought radical changes into the field of transportation. Railways were costly undertakings which could not be duplicated by the individual."

The footnote on p. 143 from which the quotation I have just given has been taken, contains a reference to a book published in 1947 by I. B. Lake. Professor Lake is Professor of Law at Wake Forest College.

I think it is worth while my reading to you extracts I have taken from that book. It was published in 1947. He has entitled the chapter to which I want to refer "Development of Legal Restraints". In this quotation which appears in the copy of my notes which you have before you, the underlining is mine and the succession of dots indicate omissions which I felt could properly be made. The quotation is as follows:

"Prior to the coming of the railroad, transportation for hire to the interior was of little importance. Industries and mercantile establishments clustered around the good harbor. Large scale trade was port-to-port trade and goods were usually carried in ships owned by either the buyer or the seller. So long as transportation was supplied directly by the buyer or seller society was not concerned greatly with its price.....

(Page 23125 follows).

"Inland transportation before the advent of the railroad was transportation of farm and forest products to port, with a slow trickle back of such manufactured goods as could not be produced on the farm. The itinerant peddler's wagon wound through the backcountry loaded with goods from the outside world, Local trade was served by the buyer's or seller's own teams. Only the surplus products of the farm were 'exported'. Here again, transportation was by the producer's wagons making an annual trek to the city, or by his flatboat or raft floating down the river with the spring freshet..... The traveler's own horse, coach or canoe carried him to such places as he wished to visit..No carrier for hire dictated transportation rates or speeded one man's products to market while another's were held back. The producer's vehicle was as speedy as the carrier's. The employment of a carrier for hire was a matter of convenience, not a necessity of competition.... The shipper was in the stronger position of the two, and rates were the result of haggling and bargaining. Some discrimination resulted, of course, but it was not systematic, nor could it have been of substantial consequence as it was too easy for the shipper to serve himself.....

(p.31) The railroad changed all this."

(9.32) "No longer was the shipper equal in bargaining power to the carrier. No longer was it possible for him to do his own hauling when he could not reach an agreement with the carrier as to rates. Distances had become too great for wagon hauls. The carrier was the master and his rule was an autocratic one.

.....

(p.33) The railroad magnate gave his friends preferential freight rates, enabling them to undersell their rivals

and monopolize the market..... The large shipper was favored over the small shipper because his traffic was worth more to the railroad.

(p. 34) With the rise in power of the railroads they were faced with a monopoly in fact, which, theoretically, could be broken, but which the shippers themselves could not break, as their fathers would have been able to break any monopoly in fact of the common carter."

Now, I have taken the time to refer to that, because it seems to me that one tends rather to forget what brought about the necessity of regulation. Now I would like to compare it with the position today.

The position today is that we are face to face with a decision which must be taken in the face of directly conflicting viewpoints. We have had very generally among the provincial representations, headed by those of Manitoba whose representations are by far the most extreme, suggestions that the present day circumstances require a more complete and stringent form of regulation than we have heretofore experienced. One finds, for example, Manitoba putting forward in its Brief and through its witness Mr. Moffat, an entirely new principle. That is to say, that because railways were subsidized in their beginning and because they have become of such extreme importance to the economy, Mr. Moffat says at p. 8475, the "emphasis has shifted" and has "moved over into the field of how are we best going to use this service".

Again on the same page Mr. Moffat said that the Board must not merely prevent things from happening, it must "take some initiative on its own and starting things to happen".

At pp. 8483-4-5 Mr. Moffat stated that the public attitude shows "need for complete reassessment". At p. 8486 he states that a larger measure of positive direction is required and at p. 8472 he described it as "a slight narrowing of the range within which the railways will be free to operate."

At p. 8504 the suggestion is made that the Government should intervene to direct the Board on matters of policy although at p. 8508 it is admitted that "any significant number of interventions by the Dominion Cabinet would be unfortunate in that they would destroy the usefulness of the Board as a maker of policy."

On the same page he stated that the Cabinet should intervene if there is "a sufficient national question involved".

THE CHAIRMAN: Pardon me a moment. Do you think by this quotation you have just given us that in using the word "policy" Mr. Moffat simply means the powers given to the Board under the Act as it is now?

MR EVANS: Well, I had the greatest difficulty---

THE CHAIRMAN: And that that likewise then would be the policy which he intends the Cabinet to exercise?

MR EVANS: I think there is no doubt about that, as their amendments disclose, but at the time when he was giving his evidence and when I read his brief I must say that I had the greatest difficulty understanding what he did mean. But I get from the amendment which I have already discussed with your lordship that it must have reference to the policy to be pursued by the Board under their powers under the Act. I do not think the Governor in Council could legislate; I mean I do not think the Governor in Council could, in regulating under subsection 2 of section 38 as proposed, say to the Board, "You must not pay any attention

to section 325 of the Railway Act as a matter of policy." I think that would be clearly legislating.

THE CHAIRMAN: But in so far as the Railway Act does give the Board discretion to exercise in matters of policy, it must be something that can be justified within the Act, mustn't it? That is, the Board does something and says, "Now, as a matter of policy we do so-and-so."

MR EVANS: I think that is true.

THE CHAIRMAN: They have to remain within the Act.

MR EVANS: Yes; that is 38(2).

THE CHAIRMAN: Now, it would appear by what you quote from Mr. Moffat here that all he really means by the use of this very vague word "policy" is that the Dominion Cabinet should have power to exercise that same policy, that is, a policy justified by the Act.

MR EVANS: I think that is what their legislation, by adding subsection 2 to 38, indicates.

THE CHAIRMAN: I suppose the Governor in Council by 52 can do that now.

MR EVANS: I want to keep 38(2) and 52(1) separate, because I think clearly 38(2) does as your lordship suggests. I think 52(1), because of the extreme language that is used, might go further.

THE CHAIRMAN: Yes, I see what you mean. I am endeavouring to arrive at what Manitoba means by this word "policy". They say here "the usefulness of the Board as a maker of policy". That must mean the Board acting within the provisions of the Act.

MR EVANS: Well, I think so.

THE CHAIRMAN: Unless in some of their amendments they are asking to have the powers of the Board extended within the Act. I do not know about that.

MR EVANS: Well, of course, I do not think the Board is a maker of policy in that sense in which the words are used.

THE CHAIRMAN: They say that, while the Dominion Cabinet should be allowed to intervene in matters of policy, it should not go so far as to destroy the usefulness of the Board in that respect. I would take it, then, that when they talk of the Government exercising jurisdiction in matters of policy they mean that same policy, whatever policy the Board may now exercise or might exercise if their amendments are adopted, under the Act.

MR EVANS: I think that is quite clearly the result of 38(2).

At p. 8523 Mr. Moffat stated that the standard of service to be provided was one for the Board to determine and that the Board should consider "the relative prosperity of the country."

The concept of Manitoba is amply demonstrated by the amendments they propose should be made to the R ilway Act. It is, I think, sufficient to say that the position of Manitoba and, to a lesser degree, that of Alberta and the Maritimes, quite clearly indicates the view that regulation needs to be extended to a very substantial degree.

THE CHAIRMAN: That may expand the meaning of the word "policy".

MR EVANS: Well, I am dealing now with the concept that under present conditions you need not less but more regulation, and I have laid my foundation perhaps not too logically, but I had hoped it would be, by pointing to the beginning of the need for regulation and showing now what has happened to these proposals and what the conditions are, which I am going to set up again in a few minutes, that justify them.

Alberta, while taking a more moderate attitude, concerns itself primarily with equality of tolls as between localities; the long and short haul discrimination question and also with the matter of the relation between the rates on raw materials and finished products. These concepts of Alberta are based primarily on a desire to achieve benefits for itself and they are founded in the main upon references to conditions in the United States and to the system of regulation in effect in that country. It is not my purpose to develop these arguments in detail. I am at the moment more concerned with the approach to the problem as a matter of general principle. The Maritimes are principally concerned with obtaining increasing benefits through an enlargement of the application of the principle of the Maritime Freight Rates Act.

Canadian Pacific takes a directly opposite position. By and large, however, it does not ask for any relaxation of regulation as such but it believes, as indeed its Brief submits, as Mr. Carson mentioned yesterday, that present day conditions would amply justify a relaxation of regulation rather than an increase..

Bearing in mind that the theory of regulation stems from the fact that the introduction of railway transportation deprived the shipping public of an alternative provided by means of the buyer and seller transporting his goods by his own vehicle, it is extremely important to note the present trend of events has again restored to the buyer and seller of goods in many cases a real choice when, if railway rates prove to be too high or their services otherwise prove unsatisfactory to him, he may use his own vehicle.

There has been developed within the last few years a vast network of good roads. Following the con-

clusion of the First World War, the motor vehicle gradually became an extremely important factor in the transportation of goods and persons. This condition is growing year by year. In the United States it has reached serious proportions for the railroads.

Private individuals may travel today in their own motor cars or by common carrier motor buses. Shippers of goods may choose between the use of the railways, common carrier motor trucks or the use of their own vehicles. In many cases, quite apart from the matter of the cost of transportation, the use of motor vehicles has provided actually an improvement in the transportation service formerly provided by railways. It is true that in the case of the long haul, and particularly the basic commodities, the motor carrier has not made substantial inroads. It would, however, be folly to suggest that the motor truck is not a very serious competitor indeed for the railroads.

In the result, the freedom of choice which the advent of the railroads took from the shipper or consignee has, to a great extent, been restored. Regulation having developed because railroads had a monopoly and the management of railroads having been forced by regulation to give up some of their prerogatives in the national interest, an extremely strong case could be made out, and indeed has been made out, for a trend away from increased regulation towards decreased regulation of railways.

Mr. Carson referred in his argument to Dearing and Owen; I am going to have some further references, because I think they reach a point that has taken quite a prominent part in the discussions before your Commission.

Messrs. Dearing and Owen have recently written

a book called "National Transportation Policy". This book was published by the Brookings Institution in 1949. In Chap. XIII entitled "Rate Regulation and Railroad Earnings" the authors discuss the position of the railroads under the gradually increasing authority of the Interstate Commerce Commission. In that chapter the plight of the United States railroads becomes increasingly clear. At p. 287 the following statement occurs: --

THE CHAIRMAN: We will take a few minutes now.

(Recess)

MR EVANS: Just before the adjournment I had been referring to Chapter XIII in the book by Messrs. Dearing and Owen, and I was about to give some extracts from that book. At p. 287 the following statement occurs:-

"Rigidity of railroad rates clearly constituted one of the major difficulties. It is also significant that, compared with other important sectors of the economy, the railroads have realized only minor benefits from increased volume of business."

At p. 288 (bottom of page):-

"The current financial and operating positions of the railroads therefore present a striking paradox. The railroads are now operating at approximately their practical freight capacity. Yet their operating ratios and net earnings are reminiscent of a period when general business stagnation and low traffic levels afforded ample explanation for unsatisfactory financial results."

At p. 289 (top of page):-

"Most disturbing is the unfavorable trend in the factors which condition railroad credit. For years the

Putting
C.P.R.
stock back
to par.

general experience of the railroad stockholders has tended to discourage the flow of new equity capital into the railroad industry. And the unprecedented volume of peacetime business enjoyed by the carriers since 1945 has done little to restore the railroad credit position. In 1946 about 45 per cent of outstanding railroad stock failed to receive any dividends. This compares with less than 30 per cent during the 1925-29 period."

I would ask the Commission to bear that in mind, and what I am about to say later in connection with the rather horror-stricken attitude of some of the provincial counsel when they are asked to consider the possibility of putting Canadian Pacific stock back to par. They point, as they have done, to the experience in the United States, and I think that we can make the position very clear on the point as I proceed.

At p. 290 (top of page):-

"In this connection it is significant that by 1946 the bulk of railroad bankruptcy reorganizations had been completed..... Yet in a peak traffic year the owners of almost one half of the stock in an industry recently purged of excess capitalization failed to receive any return of their equity....."

"In final analysis, return on stockholders' equity has become so erratic that the railroad industry as a whole cannot obtain necessary new capital through equity financing....."

Reversal of the historic relationships between railroad prosperity and the level of business activity creates a grave problem of public policy. For, if the carriers are not permitted to realize high earnings in the midst of general economic prosperity,

their prospects for continued solvency are indeed poor. It will be impossible to maintain and improve the railroad plant at the rate necessary to meet intensive competition and to assure the availability of stand-by capacity for national security purposes."

The reason for this condition appears at p. 278 where the authors assert that:-

"The division of authority and responsibility over general rate policies has produced serious problems. First, the attempt of the Commission to discharge exacting managerial responsibilities by the use of inflexible and legalistic procedures has resulted in intolerable delays in disposing of general rate cases. The immediate consequence has been a serious impairment of the carriers' financial position. Second, the division of responsibility threatens the long-term prospects for survival of the carriers as privately financed enterprises."

The authors admit that the Interstate Commerce Commission "has gained an enviable reputation for procedural impartiality." A part of this difficulty is explained near the bottom of page 278 where it is stated that the traditional hearing, patterned on the procedure of the common law court, "apparently worked fairly well for the restrictive type of regulation that was administered by the I.C.C. prior to 1920".....But growth in the scope and complexity of the Commission's work made the traditional procedure unworkable."

It will be recalled that some of those who appeared before your Commission have concerned themselves with the so-called "legalistic" attitude of the Board of Transport Commissioners and of the difficulty of the small shipper appearing before the Board of Transport Commissioners

to face the so-called "battery" of railway lawyers in order to have his remedy. In my submission this situation is greatly exaggerated and I think it will readily be agreed that the procedure before the I.C.C. is far more formalized and legalistic than is the procedure before the Board of Transport Commissioners in Canada.

The point I wish to make about this is that if we are to adopt in this country an idea of increasing regulation, we are bound to find ourselves in an even worse position than before from the standpoint of formalized and legalistic hearings. The more complex the statute to be administered and the greater the field of activity in which the Board's jurisdiction extends, the more legalistic will be the resulting procedures. I submit most firmly to your Commission that the extension of regulation as proposed by the provincial governments will inevitably have this result.

Your Commission will note that Messrs. Dearing & Owen have made it quite clear that they attribute the conditions which have arisen in the United States to the growth in the scope and complexity of the Commission's work.

At p. 293 Dearing and Owen engage upon a discussion as to whether there is need for continuing I.C.C. control over the general level of rates. In this connection, the authors give their views as to whether it is proper for a regulatory tribunal (see p. 294) to engage in debate and speculation over such matters as: "the elasticity of demand for railroad service; (2) the basic theory of business cycles; and (3) the direction and intensity of inflationary forces, and the Commission's responsibility for restraining those forces."

The authors go on at the same page as follows:-

"It is difficult to understand why the Commission considers these subjects relevant, much less indis-

pensable, to deciding whether or not the carriers need additional revenue in order to maintain their plant and service at an adequate level. But the fact remains that a major portion of the hearing time, and presumably the Commission's deliberations in its recent rate cases, has been devoted to these essentially managerial questions and economic theories -- matters that are inherently unsuited to solution by legalistic procedure."

I pause to point out that it is new regulation in Canada directed to these very subjects which are now being proposed. See for example the proposals of Nova Scotia, New Brunswick and Manitoba for the amendment of Sec. 325. I am going to examine those later. Matters that the I.C.C. has had by legislation to deal with are being criticized by the authors as responsible for the difficulties of the railroads.

At p. 298 comment is made upon the acknowledgment by the Commission that the near-monopoly once held by the railroads has been replaced by intensive and almost universal competition. "Even at current high levels of traffic, inter-agency competition is so effective that the railroads hesitate even to propose general rate increases that would provide adequate revenue."

THE CHAIRMAN: Pardon me a moment. Is that quotation something said by the Commission or is it something said by the authors?

MR EVANS: This is by the authors.

THE CHAIRMAN: You say, "At p. 298 comment is made upon the acknowledgment by the Commission"

MR EVANS: Yes; I will read you the quotation in full.

THE CHAIRMAN: You quote the author, not the

Commission?

MR EVANS: Yes, it is the author. He says that the Commission has repeatedly acknowledged these things, and he makes the statement which I quote there.

Reference is then made to the evidence of a railway traffic officer in a recent rate case. The authors point out that "the tendency to shift the railroad freight burden to the least competitive commodities offers the real explanation for the Commission's desire to retain rigid control over general rate cases." (p. 299)

That is practically the position taken here by the provincial people, who say that at all events there is this monopoly in regard to those commodities, and that apparently is also what the authors say is the reason for the Interstate Commerce Commission retaining its rigid control.

At p. 300 reference is made to the "generous and aggressive assistance of the federal government" in developing the competitive agencies that have revolutionized transport organization and pricing.

At p. 301 it is stated:-

"If railroad management is to retain any of the essential functions of business control, it must be permitted to exercise its own judgment as to how far these rates" (other than on competitive commodities) "can be raised without driving traffic away. In making these decisions, railroad management will, of course, be circumscribed by the prohibitions against undue discrimination and against realizing an exorbitant rate of return on its total capital investment. For it will be recalled that no one, including the railroads, has seriously proposed diluting the Commission's authority over undue dis-

crimination and preference, nor the abandonment of the historical concepts of a fair return on fair value. But within these limits the rate structure must be adapted to the facts of contemporary transport organization. This means that rate relationships, regulatory concepts, and market structure that were developed to fit monopoly situations must be abandoned."

At pp. 302 and 303 the argument is made that the Commission would still have ample authority to protect the public against any exercise of monopoly power on the part of the railroads.

The authors thus frankly face the problem but strongly support the need for a relaxation of the scheme of regulation. In their view the choice is between the bankruptcies of the privately-owned railroads and a recognition in the way they suggest and the need for relieving the railways from the rigidities and delays of the present system. This poses an admitted problem which, from the questions asked by some of the Commissioners, has undoubtedly provided your Commission with some concern. From time to time during these proceedings it has been suggested, as Messrs. Dearing and Owen suggest, that the increase in motor truck competition is producing a tendency to lower rates on high grade commodities and that in the result the low grade commodities must bear an increased burden.

It is true that this situation is far more serious in the United States than it is in this country but it is undoubtedly a problem to be faced, and it will become more serious if the regulation of railways is made more rigid than it now is.

THE CHAIRMAN: Pardon me, Mr. Evans. When you

say it is more serious in the United States than it is in this country, do you mean because in this country there are still large areas where the shipper has not this facility of either shipping his own goods or turning to other shippers, trucks, and so on?

(Page 23141 follows)

MR. EVANS: No, I would not go that far. I would say that the facilities in large areas are not quite as favourable as they are in the United States. That is to say, the roadbuilding program has not progressed in this country to the same extent, but I say that in this country, outside of perhaps the wilds of northern Ontario and Quebec and some of the portions of the Northwest where there is not active competition by motor truck today, there is most active competition. It is true the roads are not what they are in the United States but I think the fundamental reason that there is not that development in Canada very probably is to be found in the climate. The problem of keeping roads open in the winter time is one of great magnitude and expense.

THE CHAIRMAN: That is common to the whole of the country, is it not, except perhaps the British Columbia slope?

MR. EVANS: Ontario makes a practice of keeping all main highways open.

THE CHAIRMAN: But the climate is bad in Ontario.

MR. EVANS: Yes.

THE CHAIRMAN: We have reason to know that.

MR. EVANS: Oh, quite, and having lived there for a great many years of my life I would agree, but they do have some means of overcoming climatic difficulties. In the United States by far the largest proportion of the total area has not got the problem of clearing snow and ice from highways in winter time.

THE CHAIRMAN: The authors whom you quote here point out the reversion under present-day conditions, so far as the shipper is concerned, to the favourable position he was in earlier, and that is due to this active competition of trucks.

MR. EVANS: Oh, my, yes; it is all-pervading.

THE CHAIRMAN: Do you not think there is a difference between Canada and the United States in that regard as to various regions of the country? You have just said of course that there is no part of Canada now, except in the very far north, where a shipper has not the facility of going to other carriers besides the railways. As a matter of fact, do you think your statement is quite justified, at least from listening to the complaints we have had? No doubt you have many more competitive rates in effect in Central Canada than you have in the western part of the country.

MR. EVANS: I would say that in part there are two reasons for that. One is undoubtedly that the greatest concentration of motor competition does exist in central Canada. That is because it had an earlier start there.

THE CHAIRMAN: Pardon?

MR. EVANS: It had an earlier start.

THE CHAIRMAN: I am not questioning why. I am not questioning the growth of the situation. Is it not the situation, however, that shippers in central Canada have greater facilities to provide for themselves than shippers in other parts of Canada?

MR. EVANS: Apart from the nature of the commodities being transported, my own view of the evidence we have had, and certainly the evidence that developed in the hearings in the 21% Case, very clearly indicates that there is hardly a part of Canada that is not very well served by motor vehicles.

Quite recently Mr. Frawley, who has been among the most vociferous people who have appeared before you on this question of competitive rates, was describing the extent to which motor trucks competed for livestock in

Alberta. My recollection is that he said that all the way down from the Northern Alberta Railway, which is the most northerly part of the whole province, there was trucking of livestock. In a previous hearing we found tremendous trucking of oil and oil products in Alberta between Edmonton and Calgary. There is hardly a part of the country that is not affected. If you say you have more competitive rates in the East than in the West I say yes, for two reasons. One is that there is a greater concentration because it had its beginning there and because of the better roads, and secondly, that I have not a doubt in the world that the concentration of traffic available is greater there than it is elsewhere. Therefore all I am saying is that the choice is there. Motor vehicles can be bought, and I ask the Commission by all odds not to overlook the most numerous competitors of the railways are not the common carrier trucks. They are the private carrier trucks.

THE CHAIRMAN: Yes.

MR. EVANS: After having stated that the problem is more serious in the United States than in Canada I say this. There is no answer to such a problem except (a) a relaxation of regulations -- I am speaking of relaxation of regulation of railways; (b) a recognition that there must be a policy by which the motor carrier is subjected to at least equal regulation with the railroads, (c) that the motor carriers shall be bound to contribute, for the privilege of using the highways, their full and proper share of the true cost of providing these highways and (d) which is extremely important, that the railways must be allowed to earn an amount sufficient to enable them to earn enough to permit them to improve their plant and services to the point at which they can increase their

efficiency and lower their costs. I think if I were doing it again I would put that at the top of my list.

THE CHAIRMAN: What?

MR. EVANS: I would put item (d) at the top of my list because quite obviously if a railway is to compete it must be efficient, and if it is to be efficient it must be in a position of having the necessary earning power to enable it to get the necessary capital to make improvements.

Much has been said before your Commission on this subject and the Brief of the Railway Association of Canada makes the position, with regard to the regulation and taxation of highway transport, clear. We cannot, I submit, go on in this country promoting alternative means of transport by means of the use of public funds and imposing at the same time a more complex and detailed regulation of railways without incurring the danger to which Messrs. Dearing and Owen so clearly point.

Moreover, if the railways are to survive, it would be folly to suppose that they can continue to operate in these circumstances without incurring the result that the low grade and non-competitive long haul commodities must bear an increasing proportion of the total cost of transportation. It is no good, as the authors Dearing and Owen point out, to increase the restriction on the railroads nor is it of any value to whittle away at their earnings in the hope that the public can gain an advantage by having the rates on low grade commodities which are not subject to competition, remain at their present levels while at the same time providing every encouragement and even generous contributions from public funds to make possible an increase in competition affecting the high grade commodities.

If I may so with respect to my friends, it seems to me there has been a lot of loose thinking on this matter. They say that because competition has developed, as it has developed, and affects high grade commodities and brings the rates on them down, you therefore have to have more and more regulation and more and more restriction. That is no answer to the problem of how you are going to transport low grade commodities. All you can do is to keep on restricting and restricting the earning power of railroads, and that in effect is an argument that you cannot afford railroads in this country.

As Professor McDougall pointed out in his evidence at page 17876 (Vol. 94) in answer to Commissioner Innis:-

"That if motor competition is entirely a provincial matter, I do not see how you are going to rectify what was done, or what is being done, by the provinces, by narrowing the railways in by still further regulations."

On p. 17877 he goes on:-

"Now, if I understand a good deal of what has gone on the record of this Commission, it is an attempt to retain all the fruits, while refusing to recognize the changes in the fundamental bases which produced those fruits; and it seems to me there is a conflict there which is too great to be allowed to go unresolved."

(Page 23147 follows)

When you are speaking of fruits, as I interpret that evidence, we have had a lot of complaints here about the competitive East and the advantages they are getting. We have had the provinces saying, "We have not got the advantage of competitive rates."

THE CHAIRMAN: You make a reference there just before the quotation to "Generous contributions from public funds". Just tell us what you have in mind or what you mean. Do you mean public money?

MR. EVANS: Public funds are being used to provide the facilities without which we could not have this competition.

THE CHAIRMAN: You have reference to road-building?

MR. EVANS: Roadbuilding and all kinds of services that go with it; clearing the highways in the winter, and so on.

THE CHAIRMAN: Oh, yes.

MR. EVANS: My friend Mr. Sinclair points out that is also true of other forms of transportation.

THE CHAIRMAN: Other what?

MR. EVANS: Other forms of transportation are being pretty largely subsidized today.

THE CHAIRMAN: You mean shipping?

MR. EVANS: Well, air and water transport. But I am particularly concerned at the moment with what is undoubtedly the major threat of the day. Speaking of the question of fruits, we have had these provinces coming forward and saying this -- and I am thinking of Mr. Frawley -- "The great No. 1 crisis is this competitive rate situation. We cannot increase the competitive rates." I am not admitting that, but he said "We cannot increase the competitive rates. Therefore on the basic

commodities the rates are going up. That is the No. 1 crisis." Yet you will remember province after province coming before you and saying, "We have not got the advantages of highway competition." The only advantage of highway competition is to produce lower rates on high grade commodities which Mr. Frawley says is providing the crisis for basic commodities. The provinces coming before you want the fruits. They want the competition in their provinces to keep their rates on high grade commodities low, and they are complaining of the threat to the rates on the low grade commodities at the same time. These provinces have the power within themselves today to regulate highway competition. They have the power to collaborate with the Dominion Government in finding a solution to this problem. I ask this Commission to consider how many of them have come forward, with the fear they have expressed of what is going to happen to their low grade commodities. I suggest to this Commission that they are unwilling to give up any of their power in a scheme to provide a solution to such problem for the railways.

It may be argued, based on these submissions, that perhaps the solution is that the Government should take over all privately-owned railways in order that this problem may not prove to be insoluble. All I say is that if there is anything to be said for the efficiency of private enterprise as a competitor for the publicly-owned Canadian National, the only hope of the people of this country who pay the cost of transportation is that transportation shall remain at least partly in private hands and that it shall be provided as efficiently and at as low a cost as possible. It

follows therefore it would not serve any useful purpose by rushing into public ownership of railways and in the end providing a less efficient and more costly operation.

It is my submission that even if it were not for the need for keeping privately-owned railways on the ground of efficiency, the acquisition by the Government of privately-owned railways would be no solution of the problem.

It simply would mean that the additional cost of transportation would be paid by the taxpayers. It could well mean that the cost of transportation would be even greater than that resulting from the condition which gave rise to such a remedy.

A still further answer to any such proposal is that the competition between the two large railway systems throughout Canada provides the only real stimulus to greater efficiency. In my submission it is only by greater efficiency that the consumers of this country can obtain cheaper transportation.

There has been some discussion before your Commission as to whether the competition between the Canadian National and the Canadian Pacific is any more than service competition. Professor McDougall in his evidence at page 17873 gave it as his view that small shippers have a leverage which no regulatory body could give in the competition between the two railway companies. He stated on the same page that in his view competition, as he put it, is "both flexible and productive". At page 17874 he stated:-

"Regulation can, at best, ensure that operations are carried on with a certain modest incompetence; but active

competition with efficiency as the price of survival will produce results."

In answer to Commissioner Innis he did not say that in his view there was any competition in rates but he did say that "when they sit down in the Canadian Freight Association, there will have to be a matching of views, in which one line may well be the spokesman for the shipper." This is really, I should think, a modest understatement. I should think it must be reasonably obvious that if one line is competing for a shipper's business it will make the lowest rate it can for the purpose and in the result may force the other railways to accept a lower rate than they otherwise would agree to. This, then, while there is equality in rates, is in effect rate competition.

COMMISSIONER ANGUS: Does that lead to cheaper operation, or provide a monopoly on rates?

MR. EVANS: I think it leads to cheaper operation in privately-owned hands, because the increasing efficiency and the incentive to survive and to meet new conditions as they arise, does produce that result. If you had all railroads under one owner, the Government of Canada, it would seem to me that it might very well either provide ^{high} rates on low value commodities or else a large deficit paid by the taxpayers. It seems to me that the only justification, in my view, for privately-owned enterprise is the ability to meet these situations as they arise, and that the pressure on a privately-owned railway company competing with another, desiring to provide low-cost services, to make the greatest amount of profit out of a given level of rates, subject to regulation as to the ceiling or top, is the one thing

that is going to produce that cheaper transportation which everybody wants but which I suggest, most want provided by the railways without compensation.

COMMISSIONER ANGUS: I expect you will be dealing later with making the most profit out of the general level of rates; I mean, with the argument that if the rates are rigidly controlled, you make the same profit.

MR. EVANS: I have some argument on the value of service principle and on the cost of service principle. I am not sure I have caught your point, sir.

COMMISSIONER ANGUS: The point is whether the just and reasonable rates authorized by the rate-making body gives you a variable profit or a fixed profit.

MR. EVANS: You mean having regard to the then conditions, is there to be a guarantee of a set earning power?

COMMISSIONER ANGUS: It is more or less that.

MR. EVANS: Perhaps we could take an illustration. The railways in the United States themselves, proceeding under what was the provision of the Transport Act which guaranteed them a fixed rate of return, applied in 1931 for an increase of 10% or 15% in freight rates. They put to the Commission an argument which really said that they were guaranteed by the Constitution, as well as by the Transport Act, a fixed return; and so long as they did not go above that, they were entitled to any increase in rates. It seems to me that as a practical matter, if a statute said that you might have a fair return which was either fixed or unfixed or left discretionary, this could be the result of short-sighted policy of the railways. They could come along in a period of depression and say, "We want the whole thing." The railways in the United States did not do that, but they could have

have said, "We want the whole return that the statute guarantees us." All I can say about that is that the law of diminishing returns operates automatically and that in the end they would defeat their own purposes. One of the difficulties that the American railways were faced with was that the Commission, looking at all these factors, felt that they were better able to decide the effect of this than the railways themselves, although the railways had not gone as far as they could have gone under the statute. My answer to that is that the best example of what the railways ^{did} in this country is to be found in the period of the depression. They never applied for any increase in rates and yet both of them were in a desperate financial condition.

(Page 23158 follows)

COMMISSIONER ANGUS: It is a little difficult for me to follow this argument that I think you have put forward, that if lower rates result from truck competition, the result is to put pressure on rates not exposed to truck competition; but that if lower rates result from inter-railway competition, the result is not to put pressure on those rates which are not subject to railway competition.

MR. EVANS: Well, if I may put it this way, the two things are not quite the same. The railways are competing for all kinds of traffic.

THE CHAIRMAN: The railways what?

MR. EVANS: The railways are competing between themselves for all kinds of traffic, and the pressure that we are speaking of to carry traffic at the lowest possible rates, operates in relief of all grades of commodities; but in the other case you have the competition between the truckers and the railways generally related only to a particular class of traffic, the higher grade. That does provide a problem, but it seems to me perfectly idle to suggest that you solve the problem by restricting the railways still further. To me the thing just does not follow, if that is an answer to the question. I hope it is. If not, I hope you will pursue it.

COMMISSIONER ANGUS: It is a partial answer, but if the railways are bidding with each other by reduced rates to get traffic and by doing so only reduce their incomes and they go to the Board and say: "Our incomes have been reduced and we now want higher rates somewhere": the answer might be in agreement to raise rates where you have lowered them and that would get you back where you started; or the answer might be: "We will authorize higher rates on some other sector of

and the traffic/^{and}that will restore matters". Now, does the lowering of the rates (and this is really my original question) simply work out through this process of rate fixing so that some other rates have been increased, or does it lead to reduced costs?

MR. EVANS: I say that it leads to reduced costs as practised by a privately owned company, because the competition originates in this way. They are both trying to get new traffic, they are trying to add to their traffic, and they are bidding for this new traffic. Now, that has an implemental value to them, which adds to their net. Now, they won't shave that down where it won't add to their net, otherwise they are improvident; but it does seem to me that that is always putting pressure on them to compete in service and in rates and to provide that as much as possible profit can be achieved. If you do that bidding for rates below out-of-pocket costs, I agree you would force rates up.

The net result of my argument is simply this -- let us not be misled into assuming that greater regulation and statutory enactments can provide any solution to the present railway problem. If there ever was a time when railway management was being forced to meet difficult problems and to provide efficient low cost service, the present is that time. Further encroachment on the powers of management under the mistaken impression that a regulatory tribunal more or less directed by and subject to appeal to the Government of the day, can perform the functions of management may result in disaster. I ask your Commission to view with the greatest suspicion and concern any scheme of regulation which will further curtail the discretion of management and at the same time provide the complexities which result in long delays and legalistic procedures by the regulatory tribunal.

Now then, I would like to discuss for a moment:-

(c) THE NATURE OF THE TRIBUNAL.

In connection with the nature of the tribunal which should exercise regulatory powers there is a complete divergence of opinion. Mr. Moffat's position is shown by his answer to Dr. Angus at p. 8587 (near the bottom of the page):-

"Q. Well, show me where I am wrong. I am trying to get at your meaning of the word 'competent' as applied to a Board. Does it mean competence of an expert in matters of economic policy, or does it mean the competence of an expert in the sense of anticipating a Gallup poll?

"A. Probably both, to some extent. Certainly the primary meaning of 'competent' must be that of an expert estimating prospects and estimating engineering information and that sort of thing; but you cannot possibly have this sort of issue, which is roughly ten per cent of the total wealth of the country, run purely on the basis of expert opinion as to what ought to be done. There has got to be some attention paid to what the public wants, otherwise -- we have a democracy in this country, and we have to pay some attention to public opinion."

When asked by the Chairman at p. 8588 how one ascertains what public opinion is and how the Board may be expected to find it, the answer is -- "The only criterion they have is the Government of the day; they are elected for that purpose."

Compare this with p. 8880 (Vol. 46) where Mr. Moffat expressed the view that the personnel of the Board, whether technically proficient or not, should be of the highest calibre and should have two characteristics -- impartiality and the ability to apply a judicial mind to the problem. He admitted on the same page that if an impartial and judicial tribunal had to consult the Government beforehand on matters of policy "to some extent that would be undesirable and to some extent desirable".

Thus the one extreme is the position taken by Manitoba which would consider as secondary the necessity for an impartial and judicial tribunal and of primary importance the need that the Board should reflect public opinion as expressed by the Government of the day.

Manitoba also suggests in its Brief and through the evidence of Mr. Moffat that the Board should not longer be bound by its previous decisions. (p. 8515).

When Mr. Moffat was cross-examined about this submission he recognized that "there had to be some kind of continuity of principle running through the Board's decisions; and that the justification for departure in a given case" (and I ask the Commission to note these words) would depend upon changing conditions". (p. 8895).

He also stated that he had not been advised that this is already the law as applied by the Board and that the Board does not consider itself bound by its previous decisions where conditions have changed. This^{is} of course, implicit in the provision of the Railway Act, Section 51, under which the Board may review, rescind, change, alter or vary any order or decision made by it. It would be impossible to imagine a more perfect system by which the Board under the present law is free to alter its decisions based upon changing conditions while at the same time

preserving what Mr. Moffat deemed to be necessary -- "some kind of continuity of principle running through the Board's decisions".

At p. 8895 I referred the Board to a typical decision which makes the law clear on that point.

If the Commission would like a reference, I will give it here. It is Toronto vs. Canadian National and C.P.R., 63 Canadian Railway and Transport Cases, 261, at page 270, C.R.T.C. being the series that has supplanted the Canadian Railway Cases.

THE CHAIRMAN: What year was that?

MR. EVANS: I have not got the year, but it looks to be about within the last two or three years from the number of the report. I will find it for you. It is very, very recent.

It is, in my submission, of no value whatever to propose that the regulatory tribunal should be either the alter ego of Government or a substitute for the Boards of Directors of the companies subject to its jurisdiction. That year was 1949, that citation.

THE CHAIRMAN: Thank you.

MR. EVANS: In my submission, if that be the principle which is to be applied, it may as well be decided at the outset that railways should all be publicly-owned.

If, on the other hand, it be the conclusion of your Commission that there is value in retaining private-ownership of railways, many, if not most, of the proposals made to you with regard to the scheme of regulation by the Board should be rejected. The scheme of regulation provided for under the Railway Act in its present form is one in which the Board has a broad discretion in regard to most of the matters falling within its jurisdiction.

Your Commission must, I think, be struck by the way in which these powers are expressed in the Act. There is not time to go through them but it can be said generally that in nearly every section, the powers conferred are conferred in terms that provide for the exercise of discretion by the Board rather than that their powers shall be in accordance with statutory direction. Your Commission will similarly be struck upon examining the amendments proposed by the Provincial Governments, by the fact that in almost every case they consist of statutory directions that are intended to lay down rigid principles to be followed by the Board.

It is of the very essence of the exercise of the duties of the Board that these duties shall not be hedged about by complicated statutory directions but on the other hand should be as largely as possible left to the discretion of the tribunal.

It is of the very essence of such broad discretions that the duties of the Board shall be carried out by an impartial body of the highest calibre. It is also of the utmost importance that discretionary powers must be exercised in an atmosphere free from pressure of any kind save the pressure provided for by the need of disposing of its work with despatch.

A Board which has a curb put upon its discretion by statutory directions of one kind or another or which is governed in matters of policy by the executive arm of Government, cannot be relied upon to exercise its discretionary powers without fear or favour. If it cannot do that, it ought not to have any discretion at all. If it has no discretion at all, then one might just as well leave the duties of the Board to the courts because the procedure would be indistinguishable from the formal and

legalistic procedure found in the courts.

Moreover, curbs on discretion have two major shortcomings. First, statutory directions constitute the principal source of legalistic disputes which can only be settled by an appeal to the courts. It is under such directions that questions of law arise. Questions arising from the exercise of discretionary powers on the other hand seldom give rise to appeals to the courts on questions of law. Appeals on questions of law should be held to a minimum. Unless this is so, no Board can deal with the day to day activities which are involved. The reason for having a Board appointed as an administrative tribunal is to avoid the delays and expense which the formal procedure of the courts would entail. Even courts must have discretionary powers but an administrative tribunal is so described largely because its powers are to a far greater extent discretionary than in the case of the courts. Dearing and Owen, as I have already pointed out, indicate that the delays and legalistic procedures of the I.C.C. are largely the result of the complexity of the functions of the Commission and of the legislation under which it operates.

Secondly, regulation is in essence an encroachment on the powers of management. It should be limited at all times to the minimum necessary to achieve the result of affording the protection to the public which is strictly necessary. Since regulation is an exercise to some extent of the function of management, it must perforce function in the same way as management: that is to say, it must be primarily concerned with applying judgment and wisdom in day to day decisions with a minimum of formality and with expedition and despatch. I think that is an absolutely fundamental approach to the question of regulation.

One of the advantages of our Railway Act and the system of regulation it provides, is that the Board has in nearly every case, broad discretionary powers. The Interstate Commerce Act is full of directions of the most complex and detailed character. In my view Canada would do well to avoid following the lead of the United States in this respect.

COMMISSIONER ANGUS: Do you think, Mr. Evans, that these directions that you speak of that the Interstate Commerce Act is full of, arise in part from the absence of any political appeal in the United States?

MR. EVANS: I have never thought of it in those terms, but I cannot see why it would. It seems to me that one of the great faults with our friends in the United States has been a tendency to make their legislation too specific. I have had some little connection with legal matters in the United States, and I would like to give you an example of my own experience to show what happens when you get a state of mind by which people want things spelled out in legislation or in contracts. It is positively staggering, the results you get.

I have in mind a particular case. The Soo Line was a subsidiary of the Canadian Pacific. It had issued up to 70 millions of bonds under a mortgage of twenty pages in length, and in the course of 40 or 50 years not one single question had ever arisen as to the interpretation of that mortgage that was not soluble very easily. In the re-organization which followed the Bankruptcy Act and the formalized and legalistic I.C.C. procedure, there emerged two mortgages, the first and second. The first secured eight millions of bonds, and it was two hundred pages in length. I do not see how any company, short of having two or three extra people on the staff, could ever

hope to work under such a mort^ggage.

Now, there is no answer to that except that once you have the intervention of statutes and regulatory bodies with complexities and directions, you get into impossible legalistic procedures; and I say simplicity and discretion provide the solution to our problem.

THE CHAIRMAN: We will adjourn now.

---The Commission adjourned at 1:00 p.m., to meet again at 2:45 p.m.

(Page 23166 follows)

Ottawa, Ontario.
May 18, 1950.
Thursday.

AFTERNOON SESSION

COMMISSIONER ANGUS: The question I was asking as we adjourned really had to do with appeals from the exercise of the discretionary power. Now, in the United States if the directions are given by statute there is an appeal to the court, but if in Canada you have wide discretionary powers there is at present an appeal to the Governor in Council.

MR. EVANS: There is.

COMMISSIONER ANGUS: Is it in your contemplation that there should be no appeal at all and that those decisions, discretionary decisions, should be final?

MR. EVANS: Well, there is always an appeal as a matter of law from a discretion, if it can be shown that the discretion was not judicially exercised or reasonably exercised. As a matter of fact, the same question came up in the recent appeal we had to the Supreme Court, where actually the power of the Board to postpone to an indefinite time in the future a final decision on the judgment on the 20% Case really amounted to a challenge to the Board's exercise of its discretion to postpone, because it had undoubted discretion to postpone; but, subject to that, yes is the answer.

THE CHAIRMAN: The postponement in that case amounted to a declining of jurisdiction.

MR. EVANS: Yes, but there was a challenge. There was an argument on Section 42, I think, of the Railway Act, as to whether the Board had not a discretion and a very broad discretion to postpone its decision. We

took the position there that that cannot be used in the extreme sense, that a discretion is a final and complete and willy-nilly discretion; but, subject to that, the answer to Dr. Angus is yes.

THE CHAIRMAN: You refer to a section of the Act; it cannot be 42.

MR. EVANS: I am sorry; I was just guessing. It is 45 (2), orders and decisions. You see, under sub-section 2, the Board may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application. Then 45(1) also has discretionary power.

THE CHAIRMAN: Well, is that not confined, though? They must make an interim order in that case, mustn't they?

MR. EVANS: No, that is only "may make".

THE CHAIRMAN: Instead of making an order final in the first instance--

MR. EVANS: May make an interim order.

THE CHAIRMAN: May make an interim order and reserve directions either for an adjourned hearing or for further application.

MR. EVANS: It was argued by the Provinces in that case that that is exactly what the Board did.

THE CHAIRMAN: I beg your pardon?

MR. EVANS: It was argued by the Provinces that that is exactly what the Board did in that September judgment.

THE CHAIRMAN: That they did make an interim--

MR. EVANS: Yes; they allowed an interim increase of 8% and they postponeded the final determination.

THE CHAIRMAN: Yes, but did they postpone it on proper grounds?

MR. EVANS: Well, that is exactly the point.

THE CHAIRMAN: Perhaps if they had given no grounds they would have been better off.

MR. EVANS: Well, I think our argument would have gone this far, that if the exercise of their discretion resulted in a failure of their duty, then that discretion was not properly --

THE CHAIRMAN: A failure of their duty, did you say?

MR. EVANS: Yes; if what they did in the exercise of discretion amounted to a declining of jurisdiction, then that was not a proper exercise of discretion, so that involves a challenge to the propriety of the exercise of discretion, and all I am saying in qualification of my answer to Dr. Angus is that, subject to that, I would say yes to his question.

COMMISSIONER ANGUS: From the discretion properly exercised you would say there should be no appeal?

MR. EVANS: No appeal, I agree.

COMMISSIONER ANGUS: And yet that is the discretion of an irremovable board, and if there is no appeal from a discretion of that sort, is not the repercussion of that likely to be that you have more statutory limitations and less discretion given by the Act?

MR. EVANS: Well, if you measure what the repercussion may be in the terms of the present tendency to want things in the Act, I think the answer is probably yes; but it seems to me, as I said earlier, that the one thing we want in this country is a faith in an impartial and judicial tribunal that will exercise its discretion judiciously and properly and fairly, and the only way you can get that is to remove it from pressure. If you got that, and you got proper appointments to your board, it

seems to me that the very essence of the Board's function as an administrative tribunal can only be exercised in a discretionary way, because, as I pointed out, management, whose powers are being in part encroached upon, have to operate that way, and therefore if you are going to substitute a regulatory tribunal it ought to have discretionary powers. It has got to apply wisdom to facts and not merely a legalistic approach.

COMMISSIONER ANGUS: I was wondering if you had wide discretionary powers if you would not perhaps have to take the bitter with the sweet, and have an appeal to some political body, an appeal which you hope would be very sparingly used, that would not likely interfere with the discretion, and that kind of thing.

MR. EVANS: Well, it is much like going to see a typhoid patient and saying, "Mathematically your chances are only X to Y that you will catch typhoid," but it seems to me that the principle is there, and if you are going to have a political body, and in particular you are going to have the kind of approach that has been made here, you are going to have right on the face of it pressure on the government to reflect through its decisions under 52(1) and under 38(2) the public clamour in regard to freight rates.

THE CHAIRMAN: Well, if you are discussing 52(1) again--

MR. EVANS: I am not; I am just using it as an example.

THE CHAIRMAN: Are you coming back to it later?

MR. EVANS: I was not, no, sir.

THE CHAIRMAN: I was going to suggest to you as one of the dangers that it may be conferring upon the Governor in Council powers outside the Act itself.

MR. EVANS: I am afraid it will.

THE CHAIRMAN: Well, of course, if necessary that could be limited simply by saying that the Governor in Council may make any order which the Board might have made, as in the case of courts of appeal .

MR. EVANS: Yes. Of course, you have got no appeal.

THE CHAIRMAN: Any statute creating a court of appeal says that the court may make such order as the judge ought to have made.

MR. EVANS: Yes.

THE CHAIRMAN: Might have made and did not make. Now, if there was a limitation of that sort made clear in the Act, that would take away your fears. .

MR. EVANS: Oh, no.

THE CHAIRMAN: Well, to some extent.

MR. EVANS: Well, no, sir.

THE CHAIRMAN: Because did you not tell me this morning that you were afraid that the section as it stands now gives the Governor in Council power to do things not sanctioned by the Act?

MR. EVANS: Yes.

THE CHAIRMAN: And I gave you as an example that the Act says "no tolls shall discriminate as between localities," and I asked you what you thought of an order made by the Governor in Council which would discriminate, and you said you thought they would have the power to make such an order.

MR. EVANS: Yes.

THE CHAIRMAN: But if the section said that the powers of the Governor in Council were simply to make such orders as the Board might make or might have made, then is it not clear that they could not do anything that the Board could not do, and consequently could not prescribe

tolls which were discriminatory and so on?

MR. EVANS: Well, that would remove that difficulty.

THE CHAIRMAN: Well, that is what I say.

MR. EVANS: But not my fear.

THE CHAIRMAN: Even with that removal, you still have the fear of - well, you object to that kind of appeal.

MR. EVANS: Oh, I think it is absolutely wrong in principle, yes.

At the adjournment I was coming to a general review of the principal complaints.

My submission is that your Commission should examine with care the complaints which have been made with a view to determining whether most, if not all, of these complaints cannot, so far as they require a remedy, be remedied under existing procedures under the Railway Act.

(d) The Principal Complaints

The principal complaints advanced before your Commission are as follows:-

- (1) Equalization of rates as between regions;
- (2) Horizontal increases;
- (3) Measures for the guidance of the Board in increase cases;
- (4) Long and short haul discrimination;
- (5) Uniform system of accounts;
- (6) Competitive rates;
- (7) Reparation;
- (8) Industrial location;
- (9) International rates.

I do not intend to be exhaustive there, but I am limiting the matter to the principal complaints.

It is not my purpose at this stage to deal with all these complaints in detail.

THE CHAIRMAN: Does that mean you are going into them later, or is somebody else?

MR EVANS: My friend Mr. Sinclair and my friend Mr. Spence will deal with some of these.

Most of them and the proposals for legislation, if any, which have been presented to you will be dealt with in detail by those who follow. I shall, however, deal more specifically with the matters of (1) horizontal increase; (2) uniform system of accounts including depreciation; and (3) the making of rates providing for the encouragement of industrial location.

My immediate purpose is to examine all of these complaints only insofar as is necessary to fit them into the basic approach I have made to the question of regulation.

(1) Equalization

The need for equalization of rates as between the various regions of Canada is recognized by the railways. In fact, they made known their views on this question as early as July 1948 when they filed the application for the increase of 20% in freight rates. At that time the railways stated that they would be prepared to make proposals for equalization of rates during the course of the Board's General Freight Rates Inquiry under P. C. 1487.

The first point I desire to make on this subject is that there can be no doubt that the Board has adequate power under the Railway Act to require and enforce any remedy which may be necessary to deal with such a complaint. The Board has already in the past in a large number of cases beginning with the Western Rates Case in 1914, taken steps to reduce so-called regional disparities and there was nothing in these decisions or in any position taken by the railway companies to suggest that the Board could not go as far along this line as it felt was necessary and proper.

When I say that the Board has all the necessary

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power I must bear in mind one qualification to which I have referred in the earlier hearings before your Commission. That is the problem provided by the Maritime Freight Rates Act. As I stated to your Commission, equalization proposals will quite probably require an amendment to that Act. I put such an amendment on the record at p. 16590 and I do not propose to deal with it further.

None of those appearing before your Commission has ever suggested that the Board has not now adequate power to deal with the question of equalization.

THE CHAIRMAN: You refer to an amendment which you put into the record.

MR EVANS: Yes; it was an attempt to---

THE CHAIRMAN: Do you intend to discuss that amendment?

MR EVANS: I beg your pardon, sir?

THE CHAIRMAN: Is that in the collection of amendments in this volume?

MR EVANS: I put it on the record at this page. I was asked for it at the time, and I gave it, I think, within a day or so. The amendment we proposed was---

THE CHAIRMAN: To what section?

MR EVANS: 3(2)(c) of the Maritime Freight Rates Act.

THE CHAIRMAN: Yes, we have it here:

"Adjust or vary such substituted tolls or rates from time to time as may, in the opinion of the Board, be necessary to give effect to any general readjustment of rates in Canada or as new industrial or traffic conditions arise, but always in conformity with the intent of this Act as expressed in sections 7 and 8 and other relative sections thereof."

What is this? Powers to somebody?

MR EVANS: Subsection 2 begins---

THE CHAIRMAN: What is section 3?

MR EVANS: Section 3 is to provide for the issue of tariffs and tolls cancelling existing freight tariffs, to give effect to the Act, and subsection 2 begins by saying that the Board of Railway Commissioners, hereinafter called the Board, is authorized and directed to do the things that are thereafter set forth in paragraphs (a), (b) and (c).

Under (b) they are to maintain or cause to be maintained the substituted tariffs while the cost of railway operation in Canada remains the same as at that date of the Act.

Under (c) they have the right to adjust or vary such substituted tolls or rates from time to time as new industrial or traffic conditions arise.

Now, I think that the proper place to amend would be in that paragraph (c), and I would give them the power to adjust or vary these substituted tolls from time to time as may in the opinion of the Board be necessary to give effect to any general readjustment of rates in Canada.

THE CHAIRMAN: Instead of "as new industrial or traffic"---

MR EVANS: No, I would leave those words in. I just give them the added power to adjust. It is quite a simple amendment, and I think an effective one.

(Page 23174 follows)

This question, and indeed many others upon which the counsel of the Provincial Governments have addressed you, has been put more upon the basis that the Board requires from your Commission some recommendation or direction for its guidance quite apart from a change in Statute.

Mr. Moffat at p. 8718 makes it clear that what Manitoba suggests is that "what is needed from this Commission is a recommendation as to the policy which should guide the Board of Transport Commissioners....In particular we are asking that they should be redirected by one means or another to accept as their basic principle this idea of equality"

See also near the bottom of the same page the following:-

"Some recommendation that either the Statute should be changed or that some change should be made so that they will not consider themselves bound by past precedents."

THE CHAIRMAN: Tell me, Mr. Evans, you say that nobody disputes the power of the Board now to equalize, is that right?

MR. EVANS: Yes.

THE CHAIRMAN: Are you referring to Section 314 when you say that?

MR. EVANS: Well, yes, 314 is the - -

THE CHAIRMAN: If you do, you have the question all over again of what is a line of railway and so on, haven't you? So far as I remember now, that is the only section of the Act that does use the language.

MR. EVANS: Yes, that could be properly described as the equalization section. It does not require

equalization pure and simple.

THE CHAIRMAN: I have been asking from the very beginning, of yourself and many others, what was meant by "the same line of railway" : because it is only on the same line of railway and other respects that equalization is called for there.

MR. EVANS: You have to read "same line or route" in conjunction with "under substantially similar circumstances and conditions".

THE CHAIRMAN: Yes, there is another modification of the - -

MR. EVANS: Could I do a manual illustration of what I think is meant by the "same line of railway"?

THE CHAIRMAN: Again. I want to ask you, is this the time for it?

MR. EVANS: I am not going at this stage to discuss 314,

THE CHAIRMAN: I don't want to precipitate a premature discussion.

MR. EVANS: All I want to say at this stage, if I may, is that the Board's power to order equalization of rates has never been questioned before your Commission and has never been questioned, so far as I know, in any question before the Board or before the Courts.

THE CHAIRMAN: Has it ever ordered equalization of rates?

MR. EVANS: In part, yes.

THE CHAIRMAN: In part?

MR. EVANS: Yes, well, it is not, in my respectful submission, good enough to say that because it has not ordered holus bolus equalization it lacks the power to do so.

THE CHAIRMAN: Can you give me an instance of where you say it has ordered equalization in part?

MR. EVANS: In Western Rates Case, in the Eastern Rates Case, in the 1920 Increase Case.

THE CHAIRMAN: You need not give them all.

MR. EVANS: In every case.

THE CHAIRMAN: Yes, those would be all matters of relief granted upon applications, is that it?

MR. EVANS: Well, in many cases they were revenue cases and in other cases general freight rates inquiries, but in every case some step has been made towards equalization.

THE CHAIRMAN: Pardon me for interrupting you, but I want to get it straight. Weren't they then using the general power and in fact performing the general duty which they have to fix and to maintain just and reasonable rates?

MR. EVANS: Yes, they were, sir.

THE CHAIRMAN: And it turned out that in the specific cases you refer to, "just and reasonable rates" meant a measure of equalization?

MR. EVANS: Yes.

THE CHAIRMAN: That is how it is.

MR. EVANS: Yes.

THE CHAIRMAN: Well, I see, that is a particular matter. Then coming back to Section 314, we have a statutory obligation to equalize, but only under certain conditions.

MR. EVANS: Under substantially similar circumstances and conditions, yes.

THE CHAIRMAN: So that if in exercising their power and performing their duty under Section 325 they find that in certain portions of the country equalization

is necessary, then of course they can make it, and it becomes part of the just and reasonable provision.

MR. EVANS: Yes, but they have always got that.

THE CHAIRMAN: Then of course, they always have power to do the same thing over the whole country as they wish.

MR. EVANS: As a matter of practical - -

THE CHAIRMAN: You would have first to show that it would be just and reasonable to do that. I don't think there is really much difference, because if it was not just and reasonable, of course, you could not have equalization.

MR. EVANS: Well, this is discernible in the Board's judgments from the very beginning in 1914, that there has been a striving towards equality, and in those cases in which they have refused to give full effect to equality, their reasons are given. I mean, I have read all these judgments at one time or other, and there is absolutely nothing in those judgments which would indicate that the Board has steeled itself against equality as a principle. But you find that where history has developed differences in rates, the movement towards equalization cannot be by the stroke of a pen, as our friends from Alberta and some of the other provinces want us to do. There is too much involved, and in the United States, for example, they have not even got a classification that is uniform throughout the United States. We have had one since about 1917. Those steps are slow steps and in the United States they are not likely to get to the same point that we are even today, because they have regional railways that may have different regional needs, and they may have to have different rate levels. It is

not a simple thing and it is not something to be done by the stroke of a pen.

THE CHAIRMAN: When you say that some of the provinces wish equalization by the stroke of a pen - -

MR. EVANS: Yes.

THE CHAIRMAN: They were amendments submitted to us to that effect?

MR. EVANS: We have two in particular that come to my mind at once. The most sweeping of all is Mr. Brazier's.

THE CHAIRMAN: By the cost?

MR. EVANS: No, he amends sub-section (1). I don't want to get into that detail, because my friend Mr. Sinclair is going to argue this question of equalization. I can say this, that Mr. Brazier will make all rates equal automatically. Mr. Frawley would recognize some distinctions and would not quite go the whole way.

THE CHAIRMAN: Then insofar as different provinces do suggest amendments to bring about equalization, Mr. Sinclair will deal with those?

MR. EVANS: Mr. Sinclair has got a very substantial amount of argument on that.

THE CHAIRMAN: That is all right then. Go right ahead.

MR. EVANS: The inference (and I have just been making some quotations from Mr. Moffat), the inference from these two extracts read together is that the only thing that is required is a direction which should guide the Board in dealing with equalization proposals. The reference to the need for a change in the statute is tied to the necessity for relieving the Board from being bound by past precedents. It is equally clear that the Board is not bound by past precedents and I shall

deal with this subject somewhat more extensively at a later stage. It follows therefore that in essence Mr. Moffat recognizes that the Board has adequate power and that its representations are really in the nature of an appeal from the Board's past decisions or are designed as such.

It is clear, moreover, that the proposals for legislation put forward by Manitoba do not involve any statutory direction as to equalization.

It should be noted, however, that one of the provisions in the draft legislation proposed by Manitoba refers to this question, i.e., proposed Section 325 A (3) (a). The only reason I am dealing with that is that it has to do with this general basic philosophy of regulation. My submission with regard to this is that in no sense does it provide any additional power to the Board.

THE CHAIRMAN: Again, Mr. Sinclair will argue that?

MR. EVANS: I am going to argue this as fitting into my general question of regulation, but Mr. Sinclair is going to deal with the detail. You will find that at page 21 of the consolidation.

THE CHAIRMAN: Of your consolidation, you mean?

MR. EVANS: Yes. My criticism of this proposed amendment related to entirely different matters. That is not a question of lacking power.

I want to just examine that particular amendment for a moment. The sub-section proposed by Manitoba is as follows:-

"3. The Board in determining any application under this section"

That application is an application under sub-section (1):-

".....for an increase or decrease in
tolls, shall have due regard to

(a) the establishment and the maintenance
of equality of tolls between various localities
in Canada."

My submission in regard to this is as follows:-

First, the proposed amendment presupposes an existing power in the Board to require the establishment of tolls which are equal as between various localities in Canada. Indeed, as I have already pointed out, it can hardly be argued otherwise in view of the unchallenged exercise of such power in the past decisions of the Board when strides in equality have been made in various ways in general freight rates inquiries and in general increase cases as well as upon specific complaints as was the case in the recent Mountain Differential decision.

Secondly, any such legislation would be bad in any event for the following reasons. I spent a good deal of time this morning pointing out to the Commission my views as to providing statutory directions unless they are strictly necessary. The first reason is:-

(a) it gives a statutory direction to "have due regard to" something in such terms as to give rise to nice questions of law in the event of a dispute arising as to what would satisfy the requirement of the Board that the Board have "due regard" to the establishment and maintenance of equality. Is the due regard which the Board must give to be established affirmatively in every judgment of the Board in which ^{an} increase or decrease in tolls is applied for? Imagine what would be the result if every such judgment had to set out that the Board has had due regard to all the five matters set out in Section 3.

Now, the second:-

(b) Such a requirement in the statute is not necessary to give powers to the Board but it does make the position much more complicated and in my submission would be entirely unworkable. I say this because it could be argued that if a shipper, for example, in Eastern Canada should apply to the Board for a reduction in rates, the Board must have due regard to the effect of its decision on equality as between localities. The question must then arise of the danger of having the Board's decision set aside by the courts if the Board should decide that after consideration of the question of equality it would refuse to make the order for the reduction of rates upon the condition that the reduction would also apply in Western Canada. This might be the result notwithstanding that the applicant might show that special conditions and circumstances required that a lower rate than the existing rate should be established and notwithstanding that the railway company proved to be willing to make such a provision. In such a case although the Board would have given some regard to the question of equality, could it not be argued before the Supreme Court that the Board had not given "due regard" to the question of equality?

I pause to point out that this requirement would have the result in many cases, of the railways refusing to go along with individual rate reductions. In the end, the the requirement would probably be sterile.

Thirdly -- as applied to the question of equality, if it should be suggested that the amendment adds to the Power of the Board (I have taken the position before that it does not) I point out that if that

that is so, it would only give such power to the Board in applications under that section, that is an application for an increase and decrease in tolls. That is to say, applications by someone for an increase or reduction of tolls "by reason of changing conditions or costs of transportation". It would not therefore empower the Board to deal with equality as such in general freight rates investigations which I submit are the only proceedings where such powers ought properly to be exercised.

THE CHAIRMAN: You think it would take away the power which you think they now have?

MR. EVANS: No, I don't think it would, but if it is argued that it does add to their power, they have put it in a section that applies only to revenue cases on its face, not the general freight rates investigations. Therefore I say that if there is to be such power added, they have put it in the wrong place, and of course, the reason is not hard to seek, because they tried to inject into these revenue cases ^{which} we have had recently, just this very question. They don't want them in general freight rates inquiries. They have all failed to take any part in the general investigation so far conducted by the Board, have made no submissions to it. The provinces and Manitoba in putting this forward, want these things to take place in revenue cases. Their legislation makes that perfectly clear. Now, I say that if you are going to have this kind of power such as I have been discussing, the only place to have it is in general freight rates inquiries and not in revenue cases.

The investigations of such matters in revenue cases would serve only to delay such cases just as the interjection of similar matters delayed the hearings in the 21st Case in which the hearings extended for 150 days largely

because general rate matters were discussed and because regional hearings throughout Canada were held.

Alberta, while not suggesting any lack in the power in the Board to establish equality of tolls, proposes extremely far-reaching legislation. In effect, Alberta takes away any discretion which the Board has on the matter and in its place substitutes a provision in the statute under which the standard and special tariffs shall be equal for all railways throughout Canada for equal distances upon the same description of traffic.

Under this proposal (see the amendment to Section 329 -- if your lordship wants to look at them, they are at pages 22-23 in the consolidation) there shall only be one standard tariff for the entire country and for all railways.

The proposal also involves a provision that, with one exception, special tariffs, that is to say, those embracing the so-called distributing and town tariff class rates, as well as the special commodity tariffs and the commodity mileage scales, must for the same description of traffic be the same for the same distances. That is, under 329A. The only exception would be that effective for not more than three years, the railway companies may establish development rates, which may be made up to 3 years under the sub-section (3).

These proposals by Alberta present positively staggering implications. It is indeed impossible in the limited time available to deal with them adequately. I content myself by saying that at one stroke of the pen all those rates included in the special class rates, the special commodity rates and the commodity mileage scales which are below the average in any part of the country would be increased to the average level and all those above the

average would be reduced to that level.

In these circumstances either the commodity rates and the special class rates would disappear and their place would be taken by commodity mileage scales for all commodities or the special commodity rates and the commodity mileage rates would disappear and a new special class rate scale equal for the same traffic and for the same distances would take its place.

In either event, nearly every industry would have major changes in its rates. The relationships now existing between one industry and another would no longer exist and undoubtedly the most serious dislocation, if not indeed chaos, would result.

I can understand how Alberta can desire to achieve equality. As I have said, the railways themselves realize that equalization can be achieved but to a limited extent. To attempt by a rigid provision in the statute to produce this overnight is little short of being impossible. I suggest that anyone who has any experience in the matter of rate-making in this country must inevitably come to the conclusion that such a sweeping proposal is nothing short of absurd. I use that with the greatest of respect. To attempt by statute to require that all rates should be equal, is just a dream, it is impractical and would be quite chaotic in its results.

We have heard of the studies which have been under way in the United States for the past two or twelve years looking to equalization of rates. We have seen that despite the fact that ten or twelve years have elapsed, the United States railroads and the Commission have not succeeded as yet even in establishing a uniform classification. Canada has had a uniform classification for many years. To suggest that Canada can achieve equality of rates as between

localities by a stroke of the pen is indeed close to absurdity no matter how much the railways and the other parties may desire it.

Mr. Sinclair will deal more specifically with the equalization proposals put forward by the Canadian Pacific through the evidence of Mr. Jefferson. I might add one thing, however, in passing. Those who propose equalization and in particular the Province of Alberta, despite the fact that I suggested to the Commission that an amendment to the Maritime Freight Rates Act would be required, have not, for reasons that seem to me to be rather obvious, made any suggestion for the amendment of that Act. I would expect that in view of the proposals made, Alberta would at least find itself in full support of that amendment.

GUIDANCE OF THE BOARD IN
GENERAL FREIGHT RATES RE-
VISION, ETC.

Then I turn to the subject which I have entitled: "Guidance of the Board in General Freight Rates revision, etc.". Before I begin my argument on that, I want to give a reference to Mr. Locklin's book which came to me after the argument had been prepared.

THE CHAIRMAN: On what point now?

MR. EVANS: This is on the question of guidance to the Board.

THE CHAIRMAN: What is the reference?

MR. EVANS: I am beginning now my notes at page 41, and the reference is to Mr. Locklin's book at page 301. It rather lays the foundation for my argument. Beginning about the middle of a paragraph about two-thirds of the way up the page:-

"There is a constant stream of bills under consideration by Committees of Congress which would modify a regulatory policy or which would specify more definitely the policies which should be observed by the Commission in administering particular provisions of the Act. Needless to say much of the proposed legislation would prove to be unwise and in fact very little of it survives the legislative process to become part of the law; but it should be clearly recognized, however, that in a democratic form of Government the ultimate responsibility for determining regulatory policies rests in the people acting through their chosen representatives".

Now then, he is saying there that you always have what he calls a constant stream of attempts by members and interests to change the law and to influence the policy of the Commission through changes in the law; and it seems to me that that is one of the things that I find pervading the attitude of our Provincial friends, that they have wanted something which they have been unable to get through the orders of the Board and they are coming in ^{rush} a/ to get the law changed. Now, it is with that thought I approach my discussion of the question of guidance to the Board under the Order-in-Council.

Order-in-Council P.C. 6033 in paragraph 2 (b) requires your Commission :-

"To review the Railway Act with respect to such matters as guidance to the Board in general freight rates revisions, competitive

rates, international rates, etc., and recommend such amendments therein as may appear to them to be advisable."

THE CHAIRMAN: You must admit though, that the paragraph does suggest a consideration of amendments.

MR. EVANS: Oh, quite.

THE CHAIRMAN: And no doubt the provinces saw that.

MR. EVANS: I am not condemning them for coming forward, but I am saying that there is a rash of these things, to do things for guidance of the Board merely because there is an invitation to do it, and I am going to argue that because there is an invitation to do it, one must not let oneself get into the habit of thinking that it should be done.

Under this paragraph of the Order-in-Council there can be no doubt whatever that the intention is that your Commission should be limited to matters involving changes in the Railway Act. It is clear, I submit, that your Commission is not asked to make recommendations intended to guide the Board by means merely of an expression of opinion which your Commission may have formed on any particular subject discussed during the hearings.

Mr. Sinclair will deal with the matter of competitive rates, international rates and other rate matters falling under this paragraph of the Order-in-Council. I shall content myself with dealing generally with the subject in relation to the point I am making that the complaints should be examined with a view to determining whether there is any real need for changes in legislation or whether the Board's powers are ample to provide any remedy that may be necessary.

One of the principal subjects upon which the provincial governments have addressed themselves has had to do with the necessity for guiding the Board in general freight rates revisions and, in particular, in revenue cases. Manitoba proposes the addition of a new section to the Railway Act for this purpose, that is to say, Section 325-A, which I have already mentioned in one other connection.

This proposed new Section is by sub-section (1) (that is at page 21 of the consolidation) applicable to - -

"An application by or on behalf of any party interest^{ed} for an increase or decrease of tolls by reason of changing conditions or costs of transportation."

(Page 23189 follows)

THE CHAIRMAN: What is the language?

MR. EVANS: The first subsection reads:

"Notwithstanding the requirements of this Act with respect to filing tariffs or tolls the Board shall, without the necessity of prior filing of tariffs, have full jurisdiction to enquire into, hear and determine an application by or on behalf of any party interested for an increase or decrease of tolls by reason of changing conditions or costs of transportation."

It is clear that this is an attempt to limit the application of the section to applications for increases and decreases in tolls and this suggests largely revenue cases. Its terms seem clearly to exclude general freight rate revisions brought about either by the Board on its own motion or under an order-in-council such as P.C. 1487, because that would not be an application by or on behalf of any party interested for an increase or decrease of tolls. This is an extremely important

distinction. I shall argue as I proceed that if there is any need for the section at all in the form in which it is put forward by Manitoba it is something which is more appropriate to general freight rates investigations by the Board than to revenue cases.

THE CHAIRMAN: Pardon me a moment. Would not the language apply equally to any combination of shippers, say?

MR. EVANS: Yes, if they were applying for a reduction in tolls, but it would not apply if the Board, either on its own motion or acting under P.C. 1487, started out to revise tolls downwards or upwards or adjust or equalize.

I have already dealt with the first lettered paragraph under 3, but I want to make some general observations

nevertheless.

Under Subsection (3) the language of the first two lines is important. It reads:-

"The Board in determining any application under this section shall have due regard to -- " the matters subsequently set out in the lettered paragraphs (a) to (e) inclusive.

I pause to point out that under the Interpretation Act Section 15, statutes are deemed to be remedial and will be interpreted as such. It follows that the proposed Subsection (3) will be construed as though the Board had not the powers to take into account the matters referred to in the lettered paragraphs or, alternatively, that their powers or previous decisions did not conform with the intention of the legislature. This is, in itself, a dangerous expedient unless it can clearly be shown either that the powers did not exist or that they were, as they existed, wrongly exercised.

I now consider the individual lettered paragraphs.

THE CHAIRMAN: Just a moment. You will have to modify what you said there, I think, a bit. That is, where the Interpretation Act says that statutes are to be deemed remedial, I think you will find there are other axioms too which modify that.

MR. EVANS: Oh, I think so; but if you put in --

THE CHAIRMAN: Your statement here is too sweeping. However, we have not got them at hand here now.

MR. EVANS: My only point is that there are other provisions of interpretation, certainly, but it does seem to me that ^{if} a section of this kind dealing with these things is put in it will have the interpretation put upon it that I

suggest, that it would be deemed to be an attempt to remedy a shortcoming either in the powers of the Board or in the exercise by the Board of its powers. That would be the approach - I do not put it any higher than that, and I am not pursuing it; I am merely saying that that is --

THE CHAIRMAN: Well, must we not remember in the first place that this section does not refer to general revisions?

MR. EVANS: Yes, that is one of its fatal defects.

THE CHAIRMAN: It has in mind an application made either for an increase or for a decrease, in the one case I presume by the railways, and in the other case by some shipper or shippers.

MR. EVANS: Yes.

THE CHAIRMAN: It is only in that special instance that the Board must take these different things into consideration.

MR. EVANS: Of course, that is one of the greatest faults of it, too.

THE CHAIRMAN: One of the greatest what?

MR. EVANS: One of the greatest faults in the section.

THE CHAIRMAN: That may be, but I am saying that it has nothing to do with general revisions.

MR. EVANS: No. If there is any virtue in it, it should have to do with general revisions, at least so far as the first lettered paragraph under 3 (a) is concerned.

THE CHAIRMAN: I don't know - I am trying to find some use for it - I don't know whether railways ever apply for increases in certain portions of the country as --

MR. EVANS: Oh, yes. An example is the agricultural implement rates where we put in a commodity rate many years ago and the normal sixth class rate was displaced, and now,

in the light of what has taken place, the railways tried to cancel the special commodity rates and restore agricultural --

THE CHAIRMAN: When you say "tried", do you mean --

MR. EVANS: Well, they took out a commodity rate and the tariff cancelling the commodity rate was cancelled.

THE CHAIRMAN: Took out the commodity rates; did you go back to the class rates then?

MR. EVANS: Well, that was what the result of taking out the commodity rate would be.

THE CHAIRMAN: That is what the result was?

MR. EVANS: Yes.

THE CHAIRMAN: Then somebody applied to have that result decreased?

MR. EVANS: Suspended.

THE CHAIRMAN: To have the commodity rate restored.

MR. EVANS: Yes.

THE CHAIRMAN: I think, then, that this section is intended to meet that sort of case, is it not?

MR. EVANS: Yes.

THE CHAIRMAN: And in that sort of case these different considerations would have to be weighed by the Board.

MR. EVANS: Yes, and it would simply mean that the Board's cases would be so cluttered, as you will see, they would have to --

THE CHAIRMAN: Was an attempt made to prevent you from doing this?

MR. EVANS: Oh, yes; the Board suspended the --

THE CHAIRMAN: Then what did the Board consider when it disposed of it? You have a case in point there?

MR. EVANS: Well, the case has been argued and has not yet been disposed of. It is our position that that was a competitive rate that could be removed at our convenience, at our desire, and my friend from Alberta, Mr. Frawley, was there arguing that it could not be done that way, it was not a competitive rate, and that the rate ought not to be back to the sixth class.

THE CHAIRMAN: Then the contest in that case was initiated by the Province of Alberta; is that so?

MR. EVANS: Well, who initiated the application for suspension I do not know. I am told the Manufacturers' Association.

THE CHAIRMAN: The Manufacturers' Association, yes; and it has not yet been disposed of?

MR. EVANS: Judgment has not been given; it has been argued.

MR. FRAWLEY: The Canadian Manufacturers' Association and the Canadian Federation of Agriculture. I was just there to lend my moral support.

THE CHAIRMAN: Were they on the same side?

MR. EVANS: And your voice, Mr. Frawley.

THE CHAIRMAN: Were those two bodies on the same side?

MR. FRAWLEY: Oh, yes, on the same side for once, yes - farm machinery, my lord.

THE CHAIRMAN: That is an equalization. Then from your experience were considerations of this sort taken more in mind by the applicants?

MR. EVANS: Well, sir, may I just answer you this way: Certainly the establishment and maintenance of equality of tolls under paragraph (a) would never come into a case of that kind. How in the world could the Board take time out to consider and to have due regard to the

establishment and maintenance of equality of tolls between various localities in Canada on a case of that kind?

Then look at the second one, (b);

"All charges and expenses of the company, including maintenance charges" -

Well, I cannot think of anything worse than to have the Board having a look into that, in that case or in a revenue case, where all charges, all charges and expenses of the company, including maintenance charges, come into it.

"(c) Whether or not the railway is operated efficiently and with due regard to any savings which **have** been, or should have been, effected, including savings under the C.N.-C.P. Act.

(d) The cost of operating any particular service and without restricting the generality of this paragraph the cost of passenger service.

(e) The level of rates set to meet competition and whether or not such rates are compensatory."

THE CHAIRMAN: Those considerations are of a much more general kind.

MR. EVANS: Well, they shall have due regard to these things, and if anybody wants to raise any of these questions the Board has got to give due regard to them under the section.

THE CHAIRMAN: What is this farm implements case? I just like to follow these things.

MR. EVANS: I will get the citation of it for you.

THE CHAIRMAN: The one that is **un-disposed** of.

MR. EVANS: I know that we tried to take out this special competitive commodity rate and restore the sixth

class rate, and it has been under way now for a year and a half.

THE CHAIRMAN: You can let me have it.

MR. EVANS: We will let you have it. We will give you a file number or something. The Board's file will probably help the Commission to locate it.

This is bad legislation for the following reasons. First, in a revenue case the maintenance of equality of tolls as between various localities ought never to be involved. The maintenance of equality of tolls is primarily a matter for general investigations or for specific cases involving individual rates. It follows, therefore, that unless tolls are to be automatically equal as is proposed by Alberta, the Board would in each revenue case have to determine whether in the circumstances then before it equality of tolls is something which should be ensured in the revenue proceeding. We have seen by the references to the book published by Messrs. Dearing and Owen the complaint in the United States of the long delays which have ensued in the proceedings of the I.C.C. in revenue cases. These have been referred to by Mr. Carson and by me in our argument. The point is that in the United States the I.C.C. does not embark in revenue cases upon questions such as the equality of tolls in different localities and indeed, by its statute as interpreted by it, it is required to give priority to decisions in revenue cases. Notwithstanding this, the complaint of Messrs. Dearing and Owen and certainly of the railroads in the United States is that too great a delay ensues between the filing of an application for an increase in rates based on rising costs, and the final decision of the Commission in that case.

As Mr. Carson has so forcefully argued, that condition is much worse today in Canada, among other things

because of the tendency on the part of the Board to hear such complaints in revenue cases and its failure in the 21% Case in particular to reject these suggestions pending a general inquiry.

Manitoba's proposal under subsection (a) of Subsection (3) would make it the duty of the Board to have due regard to the question of equality in revenue cases. All that this would do would be to ensure even more extended and protracted hearings in such cases and to perpetuate and intensify the financial distress of the railways in the meantime.

Under Subsection (b) the Board is to have due regard to --

"All charges and expenses of the company, including maintenance charges."

There can be no doubt whatever that the Board has full power to deal in a revenue case with the charges and expenses of the company including maintenance charges. They have, in fact, made a very substantial inquiry into these questions in the last two revenue cases.

As I pointed out during the course of the hearings, the Board not only ordered the railways and, in particular, the Canadian Pacific, to supply extensive data on such questions but, on its own account, it required the railways to supply data with regard to maintenance and other expenses. I should have put in, to the provinces.

THE CHAIRMAN: What do you say?

MR. EVANS: I should have added "to the provinces" at the end there. We have to supply both to the Board the provinces.

THE CHAIRMAN: I do not catch what you say there about having to add something.

MR. EVANS: At the end of page 44, I just want

to make it clear, although the language there does not, that we had to supply both the provincial counsel and the Board with maintenance data, quite different kinds of data.

It is beyond my comprehension how Counsel for Manitoba and Saskatchewan can take the position they have in connection with maintenance expenses. They have striven to leave with this Commission just as they have with the Governor in Council, that the Board has made no investigation of this subject. They are still, after three years, pointing to the increase in maintenance charges between 1939 and the present. Presumably, they can never be satisfied, no matter what evidence is introduced or what study the Board itself makes. I say that they have attempted to mislead when they say, as Mr. Shepard did at p. 21465, that the Board made no independent studies whatever in the 21% Case, thus inferring that no independent study was ever made by the Board.

In the 21% Case, 21 days in evidence and a large part of the argument were taken up on this subject, including depreciation, and a large number of additional exhibits were filed and oral evidence adduced, as well as a separate and independent study in the 20% Case made by the Board itself.

It is unconscionable to assert, as Mr. Shepard did at p. 21465, that the Board failed in its duty "to make an independent investigation and to demand from the railways the necessary information to enable it to reach a proper conclusion."

At p. 21624 Mr. McPherson said that the study suggested in the 8% Judgment was "not even referred to or apparently not even considered" and "There is nothing dealing with the situation at all" - Judgment of March 1st, 1950 - pp. 9 - 11 inclusive.

I just asked the Board to look at that judgment.

THE CHAIRMAN: That is the Judgment in the 8% Case?

MR. EVANS: March 1st. I am not going to take time to read it.

THE CHAIRMAN: What part of it?

MR. EVANS: The Judgment is March 1st, 1950, and you will find, beginning on page 9 --

THE CHAIRMAN: That is the 8% Case, isn't it?

MR. EVANS: This is the so-called 16% Judgment. You see, he is referring, Mr. McPherson is referring, to the study which the Board said in the 8% Case should be made, and he is saying that the Board in the later judgment did not even refer to or apparently did not even consider this question of maintenance; and I am asking the Commission to look at page 9 of the Judgment of March 1, 1950, and for a space of four pages they deal successively with the level of maintenance, charges to maintenance rather than capital, which was Mr. MacPherson's principal objection, depreciation and deferred maintenance.

In addition to that, when this case was being argued - the March 1st. decision flowed from it - when that was being argued the railways brought up to date all the maintenance exhibits they had filed in the case in the previous year.

I ask the Commission - and I am not going to spend too much time on it - to look at our brief at pp. 45 to 50 of Part II, where that whole question is gone into in some detail.

If your Commission desires, I shall be glad to give it a reference to the various exhibits on maintenance which were filed and proved by railway witnesses called on behalf of the Canadian Pacific as well as a large number of other exhibits and masses of data supplied to provincial

counsel for their use during the hearings.

In view of the fact that by the Interpretation Act, as I have stated, legislation is deemed to be remedial, it is clear that the interpretation of this provision would be approached from the standpoint that all that the Board had done in the past was insufficient and that something more is required. All that I can say is that nothing short of an intolerable burden would be placed upon the railways in revenue cases if they had to go any further than they have had to do in this respect.

In this connection I refer the Commission to the provisions of Section 21 under which the Board may obtain the services of experts to serve in an advisory capacity in respect of any matter before the Board.

I might also refer to Section 69:

"The Board may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Board, or upon any matter or thing over which the Board has jurisdiction under this or the Special Act."

The Board has a staff of experts in traffic matters, economics, engineering and the like. If any further experts are required to advise it there is provision already in the Act. If anything further is required it seems to the Canadian Pacific that the Board's staff might well be increased in order that investigations of this character might be carried on independently of the hearings in revenue cases. At all events, my submission is that the proposal of Manitoba in this connection is bad in principle because it is both unnecessary and burdensome to compel the Board to hold such inquiries as part of their activity during revenue cases.

Now I might turn to subsection (c).

THE CHAIRMAN: Pardon me; subsection of what?

MR. EVANS: Of this same section 325A.

THE CHAIRMAN: You mean the proposed section?

MR. EVANS: Yes.

Under Subsection (c) the Board is to have due regard to --

"Whether or not the railway is operated efficiently and with due regard to any savings which have been, or should have been, effected including savings under the C.N.-C.P. Act."

This is an even worse provision. An example of a somewhat similar contention and the way in which it was dealt with by the I.C.C. can be found in the decision in Ex Parte 168, 276 I.C.C. p. 9 beginning at p. 24. The Commission there refers to a motion made by the Secretary of Agriculture that --

"in connection with this proceeding" (which was a revenue case) "and as a prerequisite to the granting of the whole or any part of the increases sought, we institute an investigation into the operations and petitioners for the purpose of determining whether or not they are being efficiently and economically conducted as contemplated by Section 15a (2) of the Act."

That was an application by the Secretary of Agriculture in a revenue proceeding, that they do what Manitoba suggests the Board be compelled to do under our Act.

The Commission had rules in the same proceeding (272 I.C.C.) against this motion of the Secretary of Agriculture. It was then renewed at the later hearing and similarly rejected. At p. 31 (276 I.C.C.) the following appears in the judgment:-

"It was our conclusion in the prior report that an investigation of the subject, as sought by the motion of the Secretary of Agriculture and by other motions considered in that report, would be so intricate and involved as to preclude its inclusion in the present investigation, to which, inasmuch as it involves a "change in a rate, fare, charge or classification, 'we are required under Section 15(7) of the Act to give 'preference over all other questions' pending before us and to 'decide the same as speedily as possible'.

Upon reconsideration of the Secretary's motion, we are convinced that our original conclusion was sound and that on the record here made we should adhere to our prior decision."

I ask your Commission to consider the position of the railways in Canada if in a revenue case, investigations of this complexity had to be undertaken.

THE CHAIRMAN. Are you suggesting that in these revenue cases there should be a provision in our Act similar to this 15 (7) of the Interstate Commerce Commission?.

MR. EVANS: Well, I had not suggested it. I think it would perhaps be a good idea. I had not thought of it.

THE CHAIRMAN: Well, I did not intend to give you any evil inspiration.

MR. EVANS: Well, I do not accept it as an evil inspiration. I think that it should not be necessary. A Board with wide discretion - I am personally of the opinion that we should have less and less legislation. Not only is the efficiency of the operation to be investigated but the savings which have been or should have been effected are to be gone into. It is one thing to examine the efficiency of operation by reference to the statistics of

the operation which are available and quite another to determine the possibility of savings which have been or should have been made in the operation.

Moreover, in each revenue case there would have to be an investigation of the savings effected under the Canadian National-Canadian Pacific Act.

I draw this last-mentioned matter to your attention because it is an even more difficult matter to deal with in a revenue case than is the matter of efficiency or the matter of savings to the individual railroad which is being investigated as the yardstick in rate-making. As our Brief points out (p.140-1, Part I) savings under the Canadian National-Canadian Pacific Act are dependent upon the actions of the two major railway companies. For the reasons there stated the Board might have to penalize all the railways in Canada because of the failure of one or the other to carry out what, in the Board's view, were necessary co-operative savings under that Act. Mr. Spence will argue this question in more detail.

Under sub-paragraph (d) the Board is to have due regard to --

"The cost of operating any particular service and without restricting the generality of this paragraph the cost of passenger service."

To begin with, I do not think that anyone can say exactly what is meant by this provision. I do know, however, that at the request of any party in these proceedings, the Board would be forced in a revenue case to investigate the cost of operating various services and in particular, the cost of passenger service. If, say, in a given case, the cost of passenger service were determined, what would constitute that "due regard" which the Board is directed to give by the statute? Obviously, it could not be intended that the

Board should merely ascertain the cost of passenger service or of any particular service, because when it had that, and did nothing about it, it would, I should think, be argued that the Board had not paid "due regard" to that matter. The proposed statute would not only involve long delays in revenue cases but is further deficient in that it does not suggest what shall constitute "due regard" to such questions. Let us suppose, for example, that it should be determined that the cost of passenger service is in excess of the revenue from that service. Is it intended that the "due regard" which the statute imposes upon the Board shall consist of the Board's rejecting an increase if the deficit in passenger service has not been made up by increased passenger fares?

Then supposing the Board should determine on the evidence that the increase in passenger fares would not produce any added revenue. How could the Board award an increase in freight rates while at the same time rejecting the idea of an increase in passenger fares on the ground that it would not produce an increased amount of revenue? Would our friends from Manitoba then argue to the Supreme Court that the Board had not had "due regard" to these matters?

Let's take another case. Let us suppose that Manitoba should argue that the rates in Eastern Canada should be increased because the cost of operating a railway in Eastern Canada should prove in a given case to be greater in respect of a particular service.

This would mean that Manitoba would be arguing that if rates were increased throughout Canada to obtain the necessary revenue, the Board had not had "due regard" to the cost of the service in Eastern Canada. This then would be the end of equality in rates which all provinces propose. If equalization had been established and in a given rate case the cost of service in one part of the country or another were found to be greater, could the Board be said to have had "due regard" to the cost of that service unless it reflected the cost of that service in the rate level in that area? Where does my friend Mr. Brazier stand on that question? He recently obtained the removal of the Mountain Differential despite the acknowledged fact that the costs of operation in British Columbia are vastly greater than in the Prairie Provinces notwithstanding which the rates in British Columbia are on a parity with the rates on the Prairie Provinces by virtue of the recent decision.

Under sub-paragraph (e) the Board is to have due regard to --

"The level of rates set to meet competition and whether or not such rates are compensatory."

This provision is equally bad. It would require that due regard be had by the Board to all competitive rates and as to whether they are compensatory. No one could generalize on this question. All these rates would have to be investigated and the out-of-pocket costs of service would have to be determined by the Board. Here again in a revenue case the Board would have to undertake these studies and have "due regard" to them. Moreover, what would the Board do in the case of a thin traffic line where because of low density, all

rates might be found to be non-compensatory. This points to the folly of specific and sweeping provisions in a statute.

Under Sub-Section (4) the duty of the Board is --

"to make independent studies and investigations in respect to the financial and other affairs of the company for the purpose of safeguarding the interests of the public generally or any portion thereof."

Here again, notwithstanding that the Board is to give "due regard" to the matters in the lettered paragraphs of Sub-section (3), the Board must independently pursue "investigations of the financial and other affairs of the company for the purpose of safeguarding the interests of the public generally or of any portion thereof."

Here again we have further delays in revenue cases.

My general submission is that this Section is bad in concept and should be rejected for the following reasons:-

(a) There is not a single item, with the exception of the portion of Item (c) relating to savings under the Canadian National-Canadian Pacific Act, which is not entirely within the power of the Board under the present Act. The imposition of these provisions would involve simply impossible and interminable delays in revenue cases. In my submission the amendment should be rejected on that ground alone.

(b) The difficulty, however, goes deeper than that. As I have pointed out, acts are to be deemed remedial and it would, therefore, follow that the legislation would probably be interpreted as requiring specific findings

and specific treatment under each of the individual heads in every case without which the Supreme Court might well hold that the Board had not had "due regard" to these matters.

(c) Moreover, it will not suffice, in my submission, to argue that at all events these provisions should appear in the Act whether or not they relate, as it is now proposed that they should relate, only to revenue cases. The only purpose of Manitoba in putting these items forward is to ensure that these particular subjects will be fully investigated in revenue cases and must, therefore, be examined in the light of that view.

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(Page 23207 follows)

MR. EVANS: I wanted to make now a passing reference to the complaints with regard to long and short haul discrimination.

LONG AND SHORT HAUL DISCRIMINATION

The complaint on this subject is very largely that of the Province of Alberta. Mr. Sinclair will deal specifically with it and with the amendments of the legislation as proposed by Alberta. I content myself with the submission that no change in legislation is necessary to provide for any remedy which may reasonably be necessary in the event of any hardship being experienced.

The present provisions of the Railway Act are contained in subsection (5) of Section 314, which is as follows:

"5. The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line or route is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll."

Under this subsection, the Board is not to approve or allow any toll which discriminates against an intermediate point, i.e. that an intermediate point shall not be charged a higher rate than a rate to the more distant point "unless the Board is satisfied that, owing to competition, it is expedient to allow such toll."

It will thus be seen that it is an express prohibition against long-short haul discrimination in the absence of competition. If competition is present,

the Board then has a discretion. That is to say, the Board must be satisfied that it is expedient to allow such discrimination to exist.

The following points may serve to place in focus the nature of Alberta's complaint.

THE CHAIRMAN: I suppose then you might say the discrimination is authorized because in that particular case it is not unjust.

MR. EVANS: Yes, but there is more than that.

THE CHAIRMAN: But I mean, the discrimination^{which} is prohibited is unjust discrimination.

MR. EVANS: Well, there is a distinction. I can make this distinction --

THE CHAIRMAN: I am not arguing against you.

MR. EVANS: No, and I want to have your lordship perfectly clear as to what I mean about it. I think this, the word "expedient" is not necessarily related to the concept of unjust discrimination.

THE CHAIRMAN: What word expedient?

MR. EVANS: The word expedient in subsection (5). In other words the Board has to deem it expedient to allow that discrimination. The reason I make that distinction is this, that the rules which the Board has laid down in decisions on the interpretation of Section 314, make it clear that a competitive rate cannot be used as a basis for a charge of unjust discrimination at another point.

THE CHAIRMAN: That is what I say, unjust discrimination.

MR. EVANS: I am putting it a little differently to your lordship.

THE CHAIRMAN: Why do you introduce the word "discrimination" at all here? The subsection you are dealing with does not use it as far as I can see.

MR. EVANS: Well, I am not introducing this. This is the section in the Act.

THE CHAIRMAN: Now, is the word "discrimination" in subsection (5)?

MR. EVANS: Well, it is not in there as such.

THE CHAIRMAN: No, I don't think it is, but it is you who say -- you say the Board must be satisfied that it is expedient to allow such discrimination to exist. I don't know why you use that language.

MR. EVANS: Well, I want to make a distinction here which I think is perfectly sound. Your lordship put to me that the same --

THE CHAIRMAN: I put to you simply that in using the word "discrimination", you are using it here because you might say it is not unjust discrimination.

MR. EVANS: Yes, but I don't want to use the word "unjust" because unjust discrimination under the Act is has a very special meaning. It is not that kind of thing I am talking about. Discrimination is different, difference in treatment is discrimination. Now, by the ordinary rules of unjust discrimination as applied by the Board to 314 in its decisions, this kind of discrimination which results from a competitive rate in comparison with a non-competitive rate to an intermediate point, would not fall within the ordinary interpretation of unjust discrimination, for the reason that a competitive rate is not to be used as a basis for any decision as to whether discrimination exists in comparison with a rate which is not a competitive rate. So that this section --

THE CHAIRMAN: What I cannot get away from is that you are just making trouble for yourself by using the word "discrimination".

MR. EVANS: No, discrimination is a difference.

THE CHAIRMAN: Discrimination always connotes the preposition "against".

MR. EVANS: Yes.

THE CHAIRMAN: Well, that is not what is intended that the Board shall do here. It is intended that the Board shall allow a lesser rate for a long distance than for a shorter one.

MR. EVANS: Yes.

THE CHAIRMAN: And it is you who bring in the word "discrimination", not the section.

MR. EVANS: Yes.

THE CHAIRMAN: And I have asked you, since you do bring it in, then I suppose you would say that here, "while I am using the word 'discrimination', the discrimination that I see in subsection (5) is not an unjust one."

MR. EVANS: Well, if you use "unjust" in the dictionary sense of the term, I would answer "yes" to your question. The point I am trying to make is that this becomes a matter for the discretion of the Board. Now, under the other discrimination sections if it is unjust discrimination the Board has no discretion. That is my point. The Board is not to allow unjust discrimination, there is a prohibition against it in the other section of the Act.

THE CHAIRMAN: Exactly, they cannot allow it in any case.

MR. EVANS: Yes, but they can as a matter of discretion allow this kind of discrimination under (5). They can prohibit it or allow it as they deem expedient, that is my point; whereas in unjust discrimination, once they find it is unjust they have no discretion.

THE CHAIRMAN: All right, go on.

MR. EVANS: The following points may serve to

place in focus the nature of Alberta's complaint. First, Alberta thinks that it is not good enough to have merely a discretion rest with the Board as to whether this discrimination should be permitted and, moreover, complains that under the present law competition need not be actual, but may be merely potential.

The remedies sought by Alberta is to eliminate this subsection, as well as subsection (6) from Section 314 and to insert into the Act a new Section 314(a). Your lordship will find that in the consolidation, page 15, to take out subsections (5) and (6) and then they add 314(a), which is shown on page 16 of the consolidation.

It is also provided, and this is a completely new suggestion by Alberta which, so far as I am aware, is not set forth in its brief, that the toll to the intermediate point must be just and reasonable "when compared with the toll for the longer distance." (See subsection (2)).

A further provision is contained in the proposed subsection (3) requiring that with regard to existing rates, applications must be made for approval within ninety days of the coming into force of the amendment.

Provision is also made by an amendment to the section dealing with competitive rates, namely 332, that the rates to the competitive point must "more than cover the additional costs of the movement to which they apply." (See Subsection (2) of 332)-- I am not going to deal with that specifically.

The Province of Alberta called as a witness Professor D. P. Locklin, who is also the author of a book to which reference has frequently been made throughout your proceedings. That is to say, "Economics of Transportation", (3rd edition), published in 1949. In Chapter XXII, beginning at page 534, the matter of

long-short haul discrimination is reviewed and the history of the legislation in the United States begins at page 544 and continues to page 557.

My submission to the Commission is that the examination of the history as disclosed in Dr. Locklin's book and in his cross-examination at page 13082 (Vol. 62) will be helpful.

It appears that the original section prohibiting this form of discrimination was enacted in the United States in 1887. Under that section there was no discretion in the Commission to prevent so-called intermediate point discrimination, that is, long-short haul discrimination, if the railways could show that there was, in fact, competition.

Your Commission can see at once that the provisions of subsection (5) of Section 314 of the Canadian Railway Act are much more restrictive than was the original legislation in the United States, in that even if competition exists, the Board would still have a discretion not to allow the discrimination to exist.

In the United States the difficulties attendant upon the lack of discretion in the Commission were pointed up in a judgment in the Supreme Court to which Dr. Locklin's book refers. In the result, the Interstate Commerce Commission felt that the legislation was a nullity. (See p. 13082, Vol. 62.) That is because the railways, all they had to do was to show there was competition and there was no power. At page 13082 of the transcript the following question and answer appear:

"Q. Yes, in effect it was a nullity so far as it gave to the Commission no discretion to allow or disallow as they might see fit, intermediate point discrimination.

"A. I think that is a correct statement."

Incidentally there is a mistake in the transcript at page 13082 where the last line speaks of the Commission having "a discretion", but I think the context indicates that that is an error.

THE CHAIRMAN: Having a discretion -- what should it be?

MR. EVANS: It should be: "should have no discretion." I think the context makes it quite clear, but I was just drawing attention to it.

It is clear (transcript at pp. 13087 and 13088, Vol. 62) that a remedy for the position in which the Interstate Commerce Commission found itself as a result of the Supreme Court's decision could have been found in alternative directions. These alternatives were (1) to make it a requirement that the railways should first come and ask for a relief on a substantive application, or (2) they could have provided the discretion which the original legislation lacked.

In the United States they chose in 1910 to go in for more restrictive legislation. The process of adding to the restrictions and making more difficult the relief afforded to the railways proceeded until 1920 (See p. 13092). In that year it was provided that rates to the competitive point must be reasonably compensatory; that no effect should be given to potential competition, and (3) the so-called equi-distant clause was put into effect, which was later repealed.

It is to be noted that the proposal of Alberta is very substantially that in Canada, we should accept the procedure of the United States. That is to say, there should be a substantive application for relief; the rates should be reasonably compensatory; and that potential competition should be ruled out as a test of

the propriety of the competitive rate to the more distant point.

Dr. Locklin in his book at p. 552 (See also 13093 of the evidence) agreed that "there is some degree of absurdity in a rule which encourages investment in waterways, docks, and barges for the purpose of bringing about a reduction in rail rates that cannot lawfully be accomplished until such investment is made."

Dr. Locklin agreed that he would now stand by the statement made in his book and he pointed out that the Commission (See p. 13094 of the transcript) has construed the prohibition against taking into account potential competition "about as liberally as it can in order to avoid the type of difficulty or absurdity that I have suggested might occur."

At p. 13099 Dr. Locklin agreed that this relaxation was sought by the Commission to get a rational answer to the problem that the language of the statute presented. In the end, the Commission held that actual movements were not necessary to establish actual competition. As Dr. Locklin put it, "there must be a reasonable prospect that traffic would move if adjustments in rates were not made," and at p. 13100 he agreed that actual competition would exist if "you had a number of ships of the tramp variety floating about the world sailing under the Canadian flag . . . looking for cargoes, but deterred by the present transcontinental rate structure."

We have had ample evidence of that condition existing in intercoastal movements by water during the past year and my submission would be that on the evidence of Dr. Locklin the Interstate Commerce Commission would

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DEPARTMENT OF THE HISTORY OF ARTS AND ARCHITECTURE

OFFICE OF THE DEAN OF THE FACULTY

CHICAGO, ILLINOIS

TO THE HONORABLE THE PRESIDENT OF THE UNIVERSITY OF CHICAGO

AND TO THE HONORABLE THE DEAN OF THE FACULTY

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hold that such competition is actual competition.

My further submission is that we would do well in Canada not to lay for ourselves the pitfall which the American legislation apparently provided for the Interstate Commerce Commission and which led that Commission to stretch the interpretation to the extent that it has had to do in dealing with these cases.

With regard to the other two principal matters, namely, the need for a substantive application, my submission is that it would be far better to let the matter go as the Act now stands, that is to say, to await the filing of a complaint or to allow the Board to act on its own motion, rather than to require that the railways make an application for relief. I say this because in the vast majority of cases the relief would unquestionably be granted. It does seem unnecessary that in respect of the few possible cases where relief would not almost automatically be granted, the railways should be compelled to make applications for all cases.

The only complaint by Alberta is that this necessity for making a complaint might prove some hardship to them and to persons interested at the intermediate points. There is no suggestion that the present transcontinental rates which are the principal source of the complaint should either be done away with or made applicable to the intermediate point. Indeed, it is not as though Alberta has not had its case heard by the Board of Transport Commissioners. Your Commission will recall that in the General Inquiry, 1925-27, the Board was quite unimpressed by the complaints of long and short haul discrimination arising out of the transcontinental freight rate structure. (See 33 CRC, 127.)

My submission is that there is a strong suspicion that Alberta's present position is borne not so much of the need for a remedy as it is out of a dissatisfaction with the decisions of the Board in the past, in which they were denied the relief they sought; because the Board did deal with those questions and they were not, as the Commission will recall, in reference to the general inquiry, impressed with the seriousness of the position of Alberta.

As for the compensatory character of competitive rates, including the transcontinental rates, there is no doubt whatever that the Board would have every power necessary to insure that rates are compensatory. Moreover, it would be naive to suggest that the railways are likely to make competitive rates on any basis otherwise than a compensatory one. Mr. Sinclair will deal with this matter in his argument, and will refer your Commission to the exhibits which have been filed showing overwhelming evidence based on car mile and ton mile earnings that the present rates are compensatory.

The proposal of Alberta to add subsection (2) to the new Section 314(a) stands, however, on a very different footing. This is an attempt quite beyond the provisions of Alberta's brief to apply the competitive rate as a test of reasonableness of the rate at the intermediate point.

THE CHAIRMAN: Pardon me, you say, the proposal to add subsection (2) to the new Section 314(a). Do you mean the proposed Section 314?

MR. EVANS: Yes.

THE CHAIRMAN: Well then, right in it they have two, haven't they?

MR. EVANS: Yes, the word "add" -- I hope your lordship understands the speed with which we had to prepare this.

THE CHAIRMAN: Yes, I just wanted to make sure that we are not considering different things. 314(a) means then the proposed section.

MR. EVANS: The proposed section 314(a) and the inclusion of Subsection (2) is on a very different footing than the rest of my attack on the section. I say this is an attempt quite beyond the provisions of Alberta's brief.

The Board has consistently held that competitive rates are not to be used as a test of the reasonableness of other rates. If this rule should be changed, one of two things must happen. The reasonableness of rates at each point intermediate between the point of origin and the more distant competitive point must have applied to them the same tests as to the more distant competitive point, notwithstanding that the competition does not exist at the intermediate points. The alternative is that the railways would be forced to forego meeting the competition.

If the competitive rate to the more distant point is to be the test of the reasonableness of the rates to the intermediate point, there would undoubtedly result a breakdown in the entire rate structure in Canada. I say this because if the test of reasonableness

proposed by Alberta is to be applied to the intermediate points, discrimination would automatically result as compared with points which are not intermediate, because there is no competition at the intermediate points.

(Page 23219 follows)

As regards rates to other than intermediate points where shippers are competing in a common market, this discrimination would have to be removed under the proposal of Alberta by making a similar scale of rates applicable to other than intermediate points.

Moreover, the test of reasonableness would not stop at the intermediate point. The competitive rates would then become the test of reasonableness for all rates and chaos would result. I use the word "chaos" because that is not an exaggeration of what might happen. Certainly the putting of all rates on the level of competitive rates would make it impossible for the railways to survive. I ask your Commission to reject out of hand the proposal of Alberta contained in subsection (2) of the proposed new Section 314(a).

In summary, I ask your Commission to reject the entire proposal of Alberta with regard to long-short haul discrimination solely on the ground that the legislation proposed is bad. Mr. Sinclair will give you other reasons which we submit are equally compelling.

UNIFORM SYSTEM OF ACCOUNTS.

Canadian Pacific does not oppose the adoption of any necessary amendments designed to establish clearly the power of the Board of Transport Commissioners to require a uniform system of accounts. However, I feel bound to point out that the present Railway Act contains adequate authority for the Board to prescribe a uniform system of accounts. I say this despite the fact that the Chief Commissioner of the Board in his judgment of September last in the 20% Case felt otherwise.

Under Section 126 it is provided that the directors of a railway company shall cause to be kept, made up and balanced "a true, exact and particular account

of the monies collected and received by the company... and of the charges and expenses attending the erecting, making, supporting, maintaining and carrying on of the undertaking and of all other receipts and expenditures of the company or the directors." That is a requirement under section 126.

By Section 33, subsection (2), the Board is given power to -- and I ask the Commission to follow me on this; it is rather close reasoning --

"order and require any company or person to do forthwith, or within or at any specified time and in any manner" --

I think those are the important words --

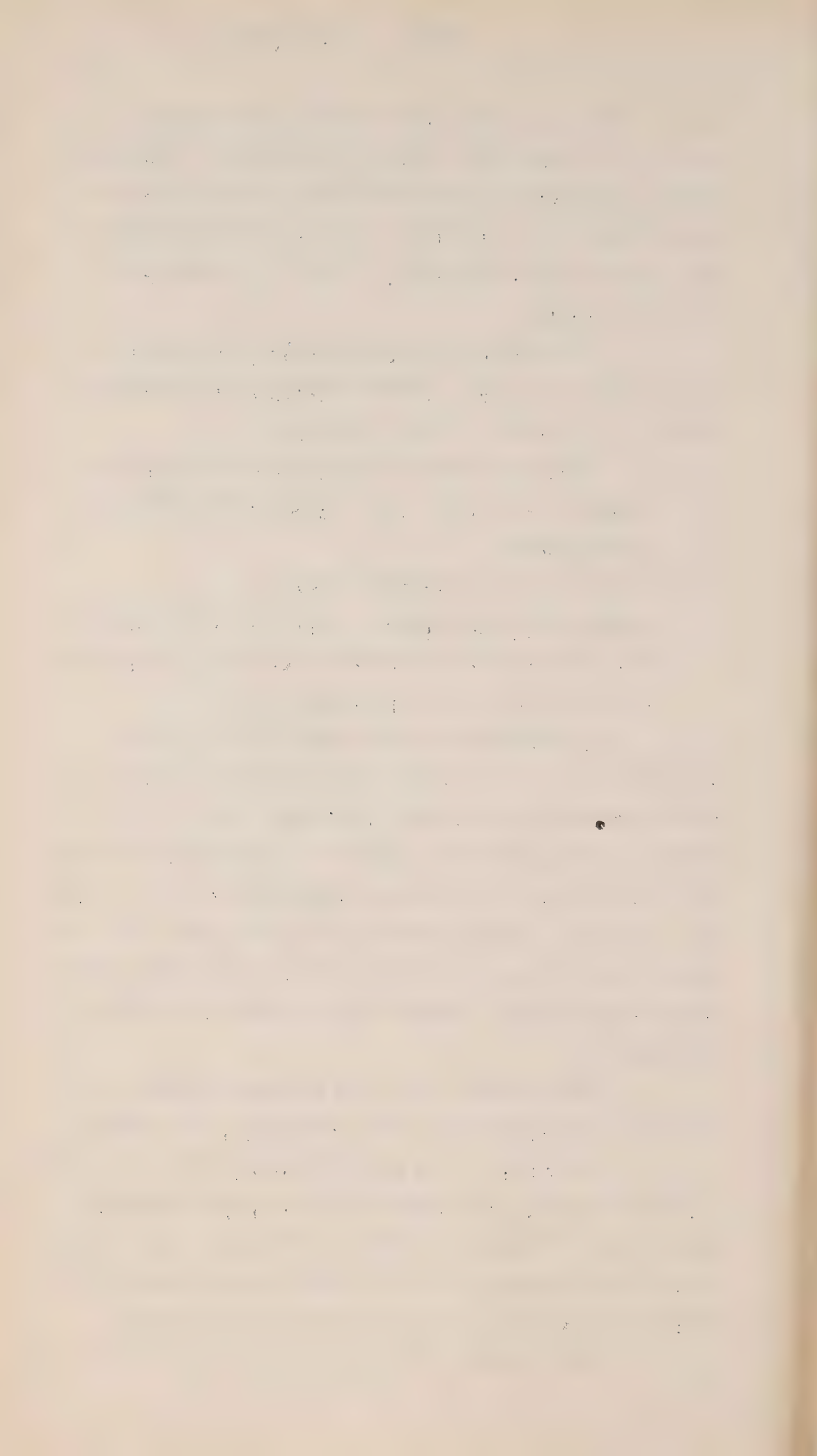
prescribed by the Board.....any act, matter or thing which such company or person is or may be required to do under this Act, or the special Act..."

My submission is that under Section 126 the directors of a railway company are "required" by the Act to keep accounts of revenues and expenditures. This is a matter or thing which the company is "required to do under this Act" within the meaning of subsection (2) of Section 33. If it is a thing required to be done under "this Act", then by subsection (2) the Board may require the company to carry on the duty imposed "in any manner prescribed by the Board".

THE CHAIRMAN: Was this bringing together of these two sections drawn to the attention of the Board?

MR EVANS: It is my recollection that it was, but I cannot be sure. The point was really never seriously argued. The Chief Commissioner in referring to the point he did was talking about Other Income, and I must confess that I could never quite follow what he had in mind.

THE CHAIRMAN: Where does he say it in that



judgment?

MR EVANS: At the bottom of page 13 you will see that he has been discussing the contentions.

THE CHAIRMAN: In the 20%?

MR EVANS: It is the so-called 8% judgment of September 1949, at page 13. In dealing with this question of Other Income, at the penultimate paragraph on the page, speaking of that, he says:

"The foregoing contention points directly to a fundamental difficulty experienced by the Board -- that the Railway Act does not, in its present form, give the Board authority to control the accounting procedure of the railways"

I do not know why he put that in there, because in any case he could segregate Other Income of the Canadian Pacific without a uniform system of accounts. Our friends have made a good deal of it, but I think there is very little doubt that legally the Board has complete power under those two sections.

THE CHAIRMAN: Offhand, it looks that way to me, and I think it is a reasonable thing too, because, since under section 126 the Legislature has directed that the directors of the company shall do all these things, it must be for the information of the Board, I suppose, particularly.

MR EVANS: Well, not necessarily. Then the Board under the other section can prescribe the manner in which we are to keep those accounts.

THE CHAIRMAN: I say it was reasonable, then, since the Board would have to have this information before it, that they should be authorized to prescribe the manner in which it was to be compiled.

MR EVANS: Yes.

THE CHAIRMAN: Yes, it looks as if that is so.

Well, what turns on that?

MR EVANS: Well, I am just saying that there is no need to change the legislation. I am not objecting to legislation if the Commission thinks I am wrong about the interpretation of the present Act, but I felt, since the question has been referred to here on several occasions, that I ought to give a clear statement of the basis of my opinion.

THE CHAIRMAN: It is referred to in the Order in Council.

MR EVANS: Yes. Well, of course, you see, you have got the decision of the Board in the 8% Case. They have never really looked at those sections.

THE CHAIRMAN: All right.

MR EVANS: It is thus obvious that the manner of keeping the accounts required to be kept by Section 126 may be prescribed by the Board, and it follows also that if the manner of keeping accounts may be prescribed by the Board, the Board can prescribe the same manner of keeping accounts for all railways subject to its jurisdiction.

It is clear, therefore, that if the Board desired to order the railway companies to keep uniform accounts, it has ample power to do so.

Manitoba has proposed the addition of a new section, namely, 438(a). I would have no objection to an amendment if your Commission deems it necessary in the form of subsection 1(a), but I think it wholly unnecessary.

THE CHAIRMAN: What is that one?

MR EVANS: That is to be found at page 25 of our consolidation -- 438A.

THE CHAIRMAN: About the uniform system of accounts.

MR EVANS: Yes. If the Commission comes to the conclusion that I am wrong in the powers, I have no objection

to that subparagraph (a) of 438A.

Nor would I have any objection to the amendment proposed under subparagraph (b) of subsection (1).

I think they are quite unnecessary, both of them, because the Board unquestionably has power to decide depreciation and the kind of depreciation and the assets to be depreciated.

THE CHAIRMAN: Which are those?

MR EVANS: That is subparagraph (b) of subsection (1) of 438A as proposed by Manitoba.

I have no objection to subsection (2), although I do not think it necessary.

With regard to subsection (3), this sub-section is unnecessary in view of the provisions of Section 70 of the present Act -- now, subsection (3) as proposed by Manitoba reads this way:

"The Board or any duly authorized officer or agent shall at all times have authority to inspect and take copies of all accounts, books, records, memoranda or other documents of any railway company."

Without arguing it, section 70 starts out by saying:

"The Minister, the Board, or the inspecting engineer, or person appointed under this Act to make any inquiry or report may

(a) enter upon and inspect any place, building, or works, . . .

(b) inspect any works, structure, rolling stock . . .

(c) require the attendance of all such persons . . .

(d) require the production of all material books, papers, plans, . . ."

To me it seems perfectly complete.

With regard to subsection (3), this subsection is unnecessary in view of the provisions of Section 70 of the present Act, which give complete power to the Board and to the Minister and to any person appointed under the Act to make an inquiry, among other things, to require the production of all material, books, papers, plans, specifications, drawings and documents, and to summon witnesses in exactly the same way as a court may do in civil cases.

In addition, provision is made for entering upon and inspecting the premises, buildings or works of a company and to require the attendance of all persons.

In making my submissions to you with regard to the matter of uniform system of accounts, I think I need not add to what I have said during the course of your proceedings. If your Commission recommends legislation in the form proposed by Manitoba, there is no need to enter upon a discussion of the user method, as compared with the straight line method of depreciation.

Your Commission I think recalls the differences between the Canadian National and the Canadian Pacific on this question. The Canadian National has seen fit through its witness, Mr. Cooper, to suggest that if a method of depreciation is to form part of your recommendation, the method should be the straight line method, but that there must be uniformity. The Canadian Pacific, on the other hand, feels that if a method is to be suggested by your Commission, it should be the user method which is recommended, but there need not be uniformity. Canadian Pacific is content with the alternative, that is to say, it is content to have each railway company left to its own choice as to the method of depreciation which it should follow. As I have stated, it seems clear that no serious lack of com-

parability in operating results would flow from the two major railway companies having different methods of depreciation. After all, the major need for uniform system of accounts is to provide comparability, but I suggest to your Commission that perfect comparability can never be achieved. An example is found in the matter of pensions.

There are many others which could be used to point the matter up. However, pensions do afford a means of testing the point I make. It seems clear that unless the two companies had exactly the same kind of pension fund, with exactly the same kind of benefits and exactly the same cost, one could not get perfect comparability in one of the larger elements of operating expenses. In these circumstances, much more important differences might appear in the accounts than would be provided by differences in the method of calculation of depreciation.

If there is one thing about the depreciation matter, it is that the user method can readily be reconciled with the straight line method in the way in which it has been done in the several exhibits filed with you and the Board of Transport Commissioners. In the case of pensions, this would not be possible under any circumstances under the present differing pension systems of the two companies.

It follows, I submit, that one should not lay too much stress upon the results to be achieved by providing for a uniform system of accounts. The principal matters upon which uniformity would be desirable would be in connection with the accounting for revenues and expenses and for operating statistics. These in a large measure are already on a comparable basis and I have grave doubt as to whether any substantial improvement would be achieved merely because a system of accounts on a uniform basis may

be prescribed by the Board.

Now, in that connection, and without arguing the matter, I think I should say this, that coupled with the matter of uniformity of accounts there have been a large number of suggestions for cost accounting practices. I think Mr. Shepard felt that rates today were made solely on judgment and experience -- I think those were his words -- and I just offer this word of warning to the Commission and to my friends, that cost accounting for railways is not only a matter of great difficulty but it is a matter of very limited value and of very high cost.

One other observation on uniform accounting:

Mr. MacPherson suggests that you could not have a rate base without uniform accounting. This is a completely pointless argument, in my respectful submission, because C.P.R. is the yardstick at the moment, and uniform accounting could not in any event assist in determining cost of property incurred before the new system is put in. Really what the point is, is that what you need are records of your cost, and uniform accounting is not going to help you with your records of your cost in the past. Uniform accounting is for a very different purpose, and I suggest to the Commission that it is of no consequence to argue that if you are going on a rate base you must have uniform accounting. It may well be that there are advantages in uniform accounting, and I am not attempting to deny it.

COMPETITIVE RATES

This matter will be dealt with by Mr. Sinclair.

REPARATIONS

Mr. Spence will deal with this matter.

INDUSTRIAL LOCATION

I will deal with this matter as proposed by Alberta, under a separate heading.

INTERNATIONAL RATES

Mr. Sinclair will deal with this subject.

I turn now to my next major subject -- Economic, Geographic and other Disadvantages, under section 2(a) of the Order in Council.

THE CHAIRMAN: Well, it is time to adjourn.

---The Commission adjourned at 4:45 p.m., to meet again at 10:30 a.m. on Friday, May 19, 1950.

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